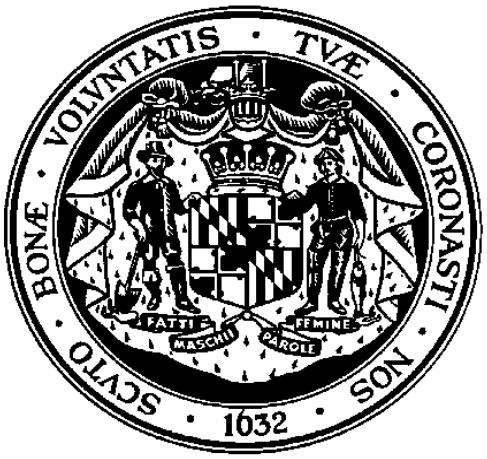
PUBLIC INFORMATION ACT MANUAL



OFFICE OF THE MARYLAND ATTORNEY GENERAL

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Eighth Edition

December, 2000

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Baltimore, Maryland 21202

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PREFACE

The public's right to information about government activities lies at the heart of a democratic government. Maryland's Public Information Act grants the people of this State a broad right of access to public records while protecting legitimate governmental interests and the privacy rights of individual citizens.

The Attorney General's Office has long sought to ensure that the Public Information Act is implemented correctly and consistently throughout State government. The previous editions of this manual became recognized as a valuable resource for both government officials seeking to meet their responsibilities under the Act and members of the press and public seeking access to information. I trust that this new edition will prove equally valuable.

Special thanks are owed to former Deputy Attorney General, now Judge, Dennis M. Sweeney for his work in preparing the first several editions of this manual. Special thanks are also owed to Assistant Attorney General Jack Schwartz who assumed responsibility for subsequent editions. Many others helped in various ways with the previous editions and this new Eighth Edition. I particularly want to recognize the contribution to prior editions of Assistant Attorney General Kimberly Smith Ward, former Assistant Attorneys General Rebecca Hornbeck and Randi Reichel, and law student interns Margaret Roberts and Amanda Stakem Conn. Assistant Attorney General William R. Varga contributed significantly to this version, and Assistant Attorney General Robert N. McDonald, Chief Counsel, Opinions and Advice, had overall responsibility for its editing. Assistant Attorney General Judith A. Armold also contributed to this edition. Special thanks to Kathleen M. Izdebski who prepared and finalized the current manuscript.

Finally, I want to thank the local government officials, members of the private bar, and representatives of the media who have offered many constructive suggestions for the manual.

This Eighth Edition includes statutory changes through the 2000 Session of the General Assembly as well as noteworthy developments in the case law and the opinions of this office.

J. Joseph Curran, Jr.

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I

Scope and Agency Responsibilities

Maryland's Public Information Act ("PIA"), Title 10, Subtitle 6, Part III of the State Government Article ("SG"), grants the public a broad right of access to records that are in the possession of State and local government agencies. It has been a part of the Annotated Code of Maryland since its enactment as Chapter 698 of the Laws of Maryland 1970 and is similar in purpose to the federal Freedom of Information Act ("FOIA"), 5 U.S.C. §552, and the public information and open records acts of other states.

The basic mandate of the PIA is to enable people to have access to government records without unnecessary cost or delay. Custodians have a responsibility to provide such access unless the requested records fall within one of the exceptions in the statute.

Public information statutes such as the PIA expand the common law right of the public to inspect government records. An appellate court of one of the states defined the common law right as follows:

> [A]t common law, every person is entitled to the inspection, either personally or by his agent, of public records ... provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information.

Fayette Co. v. Martin, 130 S.W.2d 838, 843 (Ky. 1939). *See also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978); 76 C.J.S. *Records* §63 (1994). The Maryland courts appear to have adopted this rule. *See, e.g., Belt v. Prince George's Abstract Co.*, 73 Md. 289, 291, 20 A. 982 (1890). This perspective on public access to governmental records under the common law is reflected in a 1956 Attorney General's opinion which emphasized that records could not be inspected merely "to satisfy any whim or fancy." 41 *Opinions of the Attorney General* 113 (1956).

The two main liberalizations of most modern public information laws, including Maryland's, are the abrogation of a personal "legal interest" requirement to obtain record

access and the inclusion of a wide range of public records that are available for public inspection.

Maryland's original act is very similar to those of Wyoming and Colorado and one, or both, was obviously used as a model. For a review of state public information acts, *see* Braverman and Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720 (1981). The leading treatise on FOIA also contains a chapter on state laws. 2 James T. O'Reilly, *Federal Information Disclosure* Ch. 27 (2d ed. 1999).

A. Scope of the PIA

1. Public Bodies and Officials Covered

The PIA covers virtually all public agencies or officials in the State. It includes all branches of State government (legislative, judicial, and executive). On the local level, the PIA covers all counties, cities, towns, school districts, and special districts. *See* SG §§10-601 and 10-611(g)(1)(i). (The statute has included the term "unincorporated town" since its inception, although that term is undefined and it is not clear what, if any, entities, it encompasses.) The PIA also applies to any unit or instrumentality of the State or a political subdivision. SG §10-611(g)(1)(i). *See, e.g., Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (1975) (Memorial Hospital of Cumberland is an agent of City of Cumberland). Even agencies that receive no public funds but are created by statute may be subject to the PIA. The Court of Appeals, overruling a lower court, held that one such agency, the former Maryland Insurance Guaranty Association, was subject to the PIA. *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 464 A.2d 1068 (1983). The Court considered whether the entity served a public purpose, was subject to a significant degree of control by the government, and was immune from tort liability.

A nonprofit entity incorporated under the State's general corporation law may also be considered a unit or instrumentality of a political subdivision for purposes of the PIA, if there is a sufficient nexus linking the entity to the local government. *See Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, 724 A.2d 717, *cert. denied*, 353 Md. 473, 727 A.2d 382 (1999) (Salisbury Zoo Commission subject to PIA, given the Mayor and City Council's role in the appointment of Commission members, authority over budget and by-laws, and power to dissolve Commission).

In many circumstances, FOIA and cases under the federal statute are persuasive in interpreting the PIA. However, the PIA covers a broader range of government entities than FOIA, since it covers all "public" records, not just those of "agencies," as FOIA does. Under the federal act, the immediate personal staff of the President is not included in the term "agency." As a result, records held by advisors to the President need not be disclosed under FOIA. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 155-56 (1980). Under the PIA, however, the Governor and the Governor's immediate staff are not automatically exempt. *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 759 A.2d 249 (2000). As explained by the Court of Appeals, "cases deciding whether governmental documents are 'agency records' within the meaning of [FOIA] are not very pertinent in determining whether a governmental document is disclosable under the [PIA]." 360 Md. at 555.

In light of the very broad scope of the PIA, the burden falls on any governmental entity or official asserting exclusion from the PIA to show that exclusion is consistent with a legislative intent to exempt that entity's or official's records from the PIA's general rule of disclosure.

If a county or municipality has a local law or charter provision that provides broader access to local records than that afforded under the PIA, that provision would govern release of those records unless a mandatory PIA exemption or other State law forbids disclosure.

2. Records Covered

All "public records" are covered by the PIA. The term "public record" is defined in SG §10-611(g) and includes not only written material but also photographs, photostats, films, microfilms, recordings, tapes, computerized records, maps, drawings, and any copy of a public record. *See* 81 *Opinions of the Attorney General* ___ (1996) [Opinion No. 96-016 (May 22, 1996)] ("public record" includes both printed and electronically stored versions of e-mail messages); 71 *Opinions of the Attorney General* 288 (1986) (tape records of calls to 911 Emergency Telephone System centers are public records, but portions of the recordings may fall within certain exceptions to disclosure); 73 *Opinions of the Attorney General* 12, 24 (1988) ("public record" includes correspondence that is made or received by a unit of State government in connection with its conduct of public business). *See also Armstrong v.*

Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993) (electronic version of e-mail message is a "record" under the Federal Records Act). A private document that an agency has read and incorporated in its files is a "public record." *Artesian Ind. v. Department of HHS*, 646 F. Supp. 1004, 1007 n.6 (D.D.C. 1986).

Public records are any records that are made by, or received by, a covered public agency in connection with the transaction of public business. The definition encompasses the salaries paid to public employees, including bonuses and performance awards. SG §10-611(g)(2); *Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855; Opinion of the Attorney General No. 81-034 (November 23, 1981) (unpublished); 83 *Opinions of the Attorney General* ___ (1998) [Opinion No. 98-025 (December 18, 1998)]. Again, the scope is broad, and all "records" possessed by an agency generally fall within the definition of "public records." For example, individual criminal trial transcripts in the hands of the Public Defender are public records available for inspection and copying. 68 *Opinions of the Attorney General* 330 (1983). Similarly, prosecutorial files of a State's Attorney are accessible public records unless an exemption under the PIA applies. 81 *Opinions of the Attorney General* ___ (1996) [Opinion No. 96-003 (January 31, 1996)]. In addition, records gathered by a unit of State government that were given to the federal government to be used at a federal trial and not used exclusively at a State trial are still considered "public records" subject to disclosure, if the State agency has either the original documents or copies of them. *Epps v. Simms*, 89 Md. App. 371, 598 A.2d 756, 760 (1991).

Although most records located at a public agency fall within the definition of "public records," some records might fall outside the definition. For example, the Supreme Court held that Henry Kissinger's notes of telephone conversations, prepared while he was in the Office of the President, were not State Department records under FOIA, even though Dr. Kissinger had brought them with him to the State Department. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). The Court noted that "[i]f mere physical location of papers and materials could confer status as an 'agency record', Kissinger's personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA." 445 U.S. at 157.

Certain records in possession of the State may not qualify as "public records." For example, records of telephone calls made from Government House, the official residence of

the Governor in Annapolis, are not public records under the PIA. *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 536, 759 A.2d 249 (2000). Similarly, personal matters and family engagements may properly be redacted prior to release of the Governor's scheduling records under the PIA. *Id*., 360 Md. at 543. In *Office of the Governor,* the Court of Appeals declined to address whether telephone message slips and an official's individual appointment calendar that is not distributed to other staff are public records. *Id*., 360 Md. at 555. *Cf. Bureau of National Affairs v. Department of Justice*, 742 F.2d 1484, 1496 (D.C. Cir. 1984) (such records not "agency records" under FOIA).

A private contractor's own records are not "public records" if the agency does not possess them, even if the agency has a contractual right to obtain them. *Forsham v. Harris*, 445 U.S. 169 (1980). *See also* 80 *Opinions of the Attorney General* ___ (1995) [Opinion No. 95-057 (December 20, 1995)] (definition of "public record" does not extend to records that are required to be maintained by an applicant for a residential child care facility license, if they never come into the possession of a State agency). On the other hand, an agency's records remain "public records" even if the agency outsources the task of maintaining them to a private contractor.

B. Role of the Custodian and Official Custodian

Central to the structure of the PIA are the roles played by the "custodian" and "official custodian" of the agency records. They are the public officials who must take actions under the PIA.

A custodian is any "authorized" person who has physical custody and control of the agency's public records. SG §10-611(c). The "custodian" is the person who has the responsibility to allow inspection of a record and to determine, in the first instance, whether inspection can or should be denied. SG §10-613. The custodian is also responsible for preparing written denials when inspection is not allowed. SG §10-614(b). An agency official or employee who is not entitled by law to possess agency records may still become a "de facto" custodian and, therefore, become "authorized" within the meaning of SG §10-611(c) when he or she in fact has assumed custody of public records. 65 *Opinions of the Attorney General* 365 (1980).

The "official custodian" is the officer or employee of the agency who has the overall legal responsibility for the care and keeping of public records. SG §10-611(d). Usually, the "official custodian" will be the head of the agency. The official custodian is authorized to decide whether to seek court action to protect records from disclosure. SG §10-619. The official custodian is also the person who must establish "reasonable fee" schedules under SG §10-613. The official custodian can also be the "custodian" of the records, depending upon who has physical custody and control of the records. SG §10-611(c).

SG §10-613(b) provides that, "[t]o protect public records and to prevent unnecessary interference with official business, each official custodian shall adopt reasonable rules and regulations that ... govern timely production and inspection of a public record." A set of model regulations for State agencies is included in Appendix D.

II

Right of Access to Records

A. Right to Inspect Records

SG §10-612(a) provides that, "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." The right is made clear in SG §10-613(a), which states that, "[e]xcept as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time."

The PIA grants a broad right of inspection to "any person." There is no need for the person to show that he or she is "aggrieved" or a "person in interest." *Superintendent v. Henschen*, 279 Md. 468, 369 A.2d 558, 561 (1977). Thus, in general, a person need not justify or otherwise explain a request to inspect records and a custodian of records may not require that a person to say who they are or why they want the records as a prerequisite to responding to a request.

There are some instances in which the PIA provides a "person in interest" (defined generally by SG §10-611(e) as the subject of the record or, in some cases, that person's

representative) with a greater right of access to a particular type of record than that available to other requesters. In these instances, the custodian must find out whether the requester is a "person in interest." Such special rights of access apply to the following types of records or information: examination records (SG 10-618(c)), information about a person's finances (SG 10-617(f)(3)), higher education investment contracts (SG 10-616(n)(2)), information relating to notaries (SG 10-617(j)(4)), licensing information (SG 10-617(h)(4)), medical or psychological information (SG 10-617(b)(2)), personnel records (SG 10-616(i)(2)), records pertaining to investigations (SG §§10-618(f)(2)), retirement records (SG 10-616(g)), and student records (SG 10-616(k)(2)). *See also Mayor and City Council of Baltimore v. Maryland Committee Against the Gun Ban*, 329 Md. 78, 617 A. 2d 1040 (1993) (political committee that was served a subpoena was not a "person in interest" in connection with records relating to a Baltimore City Police Department Internal Affairs investigation; the officers who served the subpoena were the subject of the investigation and, thus, were the "persons in interest") and 71 *Opinions of the Attorney General* 297 (1986) (tape recording of a hearing involving involuntary admission of a patient to State mental health facility is available only to the patient, the person in interest, or the patient's representative; recording is not available to others, including staff who participated in the hearing, absent patient's consent).

An agency has no obligation to *create* records to satisfy a PIA request. For example, if a request is made for the report of a consultant and the consultant did not issue a written report, the PIA does not require that a written report be created in order to satisfy the request. Nor is an agency required to reprogram its computers or aggregate computerized data files so as to effectively create new records. *See Yeager v. DEA*, 678 F.2d 315, 324 (D.C. Cir. 1982).

Sometimes a person will present an agency with a "standing request" which seeks production of a category of public records at regular intervals in the future as those records are created. Although an agency may honor such a request, the agency is not required to commit itself to provide records that have not yet been created. *See* Letter of Advice to Mark M. Viani, Associate County Attorney, Calvert County, from Assistant Attorney General Jack Schwartz (May 22, 1998).

B. Governmental Agency's Access to Records

The PIA generally regulates the access of one governmental agency to the records of another. A governmental unit is specifically given the right to inspect public records in SG §§10-612, 10-613, and 10-614 and is given the right to appeal a denial of inspection by SG §§10-622 and 10-623. Thus, when a request for inspection of records is made to a State agency by another State agency, a federal agency, or a local governmental entity, the custodian should consider the effect of the PIA. *See Prince George's County v. Maryland Comm'n on Human Relations*, 40 Md. App. 473, 485, 392 A.2d 105, 113 (1978), *vacated on other grounds*, 285 Md. 205, 401 A.2d 661; 81 *Opinions of the Attorney General* ___ (1996) [Opinion No. 96-019 (May 23, 1996)]. In addition, the agencies involved should consider whether another law governs the matter of interagency access. For example, requests for access to records by the Legislative Auditor in connection with an audit are *not* governed by the PIA. 76 *Opinions of the Attorney General* 287 (1991).

C. Scope of Search

The PIA does not address the issue of the adequacy of the agency's search for records. Guidance may be found, however, in the case law under FOIA. In judging the adequacy of an agency's search for documents in response to a FOIA request, the court asks whether the agency has conducted a search reasonably calculated to uncover all relevant documents, not whether it has unearthed every single potentially responsive document. *Ethyl Corp. v. EPA*, 25 F.3d 1241 (4th Cir. 1994). Under this standard, agencies may be required to conduct relatively broad and time-consuming searches. *See e.g., Ruotolo v. Dept. of Justice*, 53 F.3d 4 (2d Cir. 1995) (onus is on the agency to demonstrate that a search would be unduly burdensome, and this obligation is met only in cases involving truly massive volumes of records).

D. Right to Copies

SG §10-620 grants any person who has the right to inspect a public record the right to be furnished copies, printouts, or photographs for a reasonable fee. If the custodian does not have the facilities to reproduce a record, the applicant should be granted access to make a copy. A copy of a court judgment may not be provided, however, until the time for appeal has expired or until an appeal has been adjudicated or dismissed. SG §10-620(a)(2). This

provision should be applied only to non-litigants, since the Maryland Rules of Procedure require copies to be furnished to litigants. *See* Memorandum to Clerks of the Circuit Courts from Assistant Attorney General Catherine M. Shultz (July 27, 1983).

One issue unresolved by Maryland courts is whether the right to copies affords to a requester the right to pick the format in which records are copied. For example, does a requester have the right to obtain a disk containing computerized data when the agency offers to provide a printout? Under the Electronic Freedom of Information Act Amendments of 1996, a federal agency must provide a record in the format requested if the record is readily reproducible in that format. 5 U.S.C. §552(a)(3)(B). *See* O'Reilly, *Federal Information Disclosure* §7.12 (2d ed. 1999). The PIA has no similar express requirement; therefore, this issue remains open to interpretation. There is federal authority decided before the 1996 amendments and out-of-state authority for the position, which this office has consistently taken, that the agency, not the requester, has the right to select the format of disclosure. *See Dismukes v. Department of the Interior*, 603 F. Supp. 760 (D.D.C. 1984); *Chapin v. Freedom of Info. Comm.*, 22 Conn. App. 316, 577 A.2d 300 (1990); 56 *Opinions of the Attorney General* 461 (1971); letter of advice to Sheriff Earnest Zaccanelli, Prince George's County Sheriff's Department, from Assistant Attorney General Emory A. Plitt, Jr. (June 27, 1983); Letter of Advice to F. Carvel Payne, Director, Department of Legislative Reference from Assistant Attorney General Kathryn M. Rowe, (January 9, 1995) (PIA does not require that the requested information be given in any particular form). Nevertheless, in furtherance of the PIA's general purposes, agencies should voluntarily accede to the requester's choice of format unless doing so imposes a significant, unrecoverable cost or other burden on the agency.

E. Reasonable Fees for Copies

An official custodian may charge a "reasonable fee" for copies. SG §10-621. What is "reasonable" is for the agency to initially determine, but a court may review the reasonableness of charges made by an agency. *Cf. Lybarger v. Cardwell*, 577 F.2d 764 (1st Cir. 1978); *Rise v. Tyler*, 438 F. Supp. 895 (S.D.N.Y. 1977). In establishing "reasonable" charges, the agency should base fee levels on actual costs incurred in producing the copy. Fees should not be set simply to deter requests to inspect records or get copies.

Many agencies have standard schedules of fees for copies. For example, the Department of Agriculture charges 15¢ per page for a copy of a record. COMAR 15.01.04.14. Agencies should adopt standard fee schedules so that the public and agency employees know what charges will be made. Note that if another law sets a fee for a copy, printout, or photograph, that law applies. SG §10-621(c)(1).

F. Search and Preparation Fees

Under SG §10-621(a), an official custodian may charge reasonable fees for the search and preparation of records for inspection and copying. Fees may not be charged, however, for the first two hours of search and preparation time. SG §10-621(b).

Search fees are the costs to an agency for locating requested records. Usually, this involves the cost of an employee's time spent in locating the requested records. Preparation fees are the costs to an agency to prepare a record for inspection or copying, including the time needed to assess whether any provision of law permits or requires material to be withheld. For example, where a document contains both information that the public is entitled to see and information that the custodian may not by law release, an employee's time will be needed to prepare and copy the record with the exempt information deleted. Redaction will often be necessary where records contain investigatory or confidential financial information. Agencies should decide in advance what method they will use to charge for the time devoted to search and review. Again, fees should be related to the recovery of actual costs. 71 *Opinions of the Attorney General* 318, 329 (1986) ([t]he goal ... should be ... neither to make a profit nor to bear a loss on the cost of providing information to the public).

Although the PIA does not address the issue of prepayment of fees, agency regulations may do so. Following the model regulations in Appendix D, many agencies require prepayment or a commitment to pay fees prior to copying records to be disclosed. *See, e.g.*,COMAR 08.01.06.11D(2) (Department of Natural Resources); COMAR 09.01.04.14D (Department of Licensing and Regulation). Federal agencies typically have regulations requiring prepayment or an agreement to pay fees as a prerequisite to the processing of a request, at least when fees are expected to exceed a set amount. *See, e.g.*, 16 C.F.R. §4.8(d)(3) (Federal Trade Commission); 43 C.F.R. §2.20(h) (Department of the Interior).

See Pollack v. Department of Justice, 49 F.3d 115 (4th Cir.), *cert. denied*, 516 U.S. 843 (1995) (when requester refused to commit to pay fees in accordance with agency's regulations, agency had authority to stop processing FOIA request); *Stout v. United States Parole Comm'n*, 40 F.3d 136 (6th Cir. 1994) (an agency's regulation requiring payment of fees before release of already processed records was proper and did not violate FOIA).

G. Waiver of Fees

An applicant may ask the agency for a total or partial waiver of fees. Under SG §10-621(d), the official custodian may waive any fee or cost assessed under the PIA if the applicant asks for a waiver and if the official custodian determines that a waiver would be in the public interest.

To determine whether a waiver is in the public interest, the official custodian must consider not only the ability of the applicant to pay, but also other relevant factors. A waiver may be appropriate, for example, when a requester seeks information for a public purpose rather than a narrow personal or commercial interest. In one case, the Court of Special Appeals found that Baltimore City's denial of a reporter's request to waive fees was arbitrary and capricious because the City only considered expense to itself and the ability of the newspaper to pay and did not consider other relevant factors. The Court suggested that relevant factors included the public benefit in making available information concerning one of the City's major financial undertakings and the danger that imposing a fee for information upon a newspaper publisher might have a chilling effect on the full exercise of freedom of the press. *City of Baltimore v. Burke*, 67 Md. App. 147, 506 A.2d 683, *cert. denied*, 306 Md. 118, 507 A.2d 631 (1986). *See also* 81 *Opinions of the Attorney General* ___ (1996) [Opinion No. 96-003 (January 31, 1996)] (waiver of fee is dependent upon a number of relevant factors and cannot be based solely on the poverty of the requester or the cost to the agency).

In deciding whether to waive a fee, an official custodian may find it helpful to look at case law interpreting the comparable FOIA provision, 5 U.S.C. §552(a)(4)(A). In one useful case, *Project on Military Procurement v. Dept. of Navy*, 710 F. Supp. 362 (D.D.C. 1989), the federal court identified as material factors the potential that the requested disclosure would contribute to public understanding and the significance of that contribution.

See also Larson v. CIA, 843 F.2d 1481 (D.C. Cir. 1988) (requester of information under FOIA seeking fee waiver must not have commercial interest in disclosure of information sought and must show that disclosure of information would be likely to contribute significantly to public understanding of government operations or activities); *National Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C. Cir. 1987) (fee waiver requests under FOIA grounded on public interest theory must show connection between material sought and matter of genuine public concern and must also indicate that fee waiver or production will primarily benefit public); *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 882 F. Supp. 1158 (D. Mass. 1995) (agency justified in denying request for fee where disclosure was not likely to contribute significantly to public understanding of government operations). *Cf. Diamond v. FBI*, 548 F. Supp. 1158 (S.D.N.Y. 1982) (court overturned agency's decision denying fee waiver).

III

Exceptions to Disclosure

The PIA's general right of access to records is limited by numerous exceptions to the disclosure requirement. Unless an agency obtains a special court order under the statute to justify withholding a record, there is no basis for withholding a record other than an exception in the PIA. Given the PIA's policy in favor of public access, SG §10-612(a), and the requirement that the PIA "be construed in favor of permitting inspection of a record," SG §10-612(b), these exceptions should be construed narrowly. *See Office of the Governor v. Washington Post Co.*, 360 Md. 520, 545, 759 A.2d 249 (2000).

The PIA's exceptions fall into three basic categories. First, exceptions in SG §10-615 authorize non-disclosure if a source of law outside the Public Information Act prevents disclosure. Second, the mandatory exceptions in SG §10-616 and §10-617 impose an affirmative obligation on the custodian to deny inspection for specific classes of records and information. Third, the exceptions in SG §10-618 allow the custodian to exercise discretion whether the specified records are to be disclosed. In addition, SG §10-619 contains a "last resort" provision, which allows a custodian to deny inspection temporarily and seek court approval for authorization to withhold a record that otherwise would be subject to inspection. More than a single exception may apply to a public record and the exceptions are not

mutually exclusive. *Office of the Attorney General v. Gallagher*, 359 Md. 341, 753 A.2d 1036 (2000).

Many of the PIA's exceptions parallel exemption in FOIA. Cases decided under similar provisions of the federal FOIA are persuasive precedents in construing the PIA. *See, e.g., Boyd v. Gullett*, 64 F.R.D. 169, 176 (D. Md. 1974); *Equitable Trust Co. v. State Comm'n on Human Relations*, 42 Md. App. 53, 399 A.2d 908 (1979), *rev'd on other grounds*, 287 Md. 80 (1980); 58 *Opinions of the Attorney General* 53, 58-9 (1973).

A. Exceptions Based on Other Sources of Law

Under SG §10-615(1), inspection is to be denied where the public records are "privileged or confidential by law." Furthermore, under SG §10-615(2), the custodian must deny inspection if the inspection is contrary to:

- State statute) SG §10-615(2)(i);
- federal statute or regulation) SG §10-615(2)(ii); or
- a rule adopted by the Court of Appeals or order of a court of record) SG §10-615(2)(iii) and (iv).

Many State statutes bar disclosure of specified records. *See, e.g.*, §16-118(d) of the Transportation Article (records of Medical Advisory Board are confidential); *but see* 82 *Opinions of the Attorney General* ___ [Opinion No. 97-007 (March 14, 1997)] (person in interest is entitled to MVA information relating to the person's fitness to drive, subject to limited exceptions). In light of SG §10-615(2)(i), statutes of this kind bar disclosure despite the otherwise broad right of access given by the PIA. *See, e.g.*, 81 *Opinions of the Attorney General* ___ (1996) [Opinion No. 96-019 (May 23, 1996)] (applying statutory accountant-client privilege). Similarly, a federal statute or regulation may prevent disclosure of a record. *See, e.g.*, 7 U.S.C. §2020(e)(8) (states must limit disclosure of information concerning food stamp applicants). The exception is basically a statement of the federal preemption doctrine.

A rule adopted by the Court of Appeals or order of a court of record can also prevent disclosure of a record. A court rule fitting this description is Maryland Rule 4-642, which requires court records pertaining to criminal investigations to be sealed and protects against

disclosure of matters occurring before a grand jury. *Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 737 A.2d 592 (1999) (discussing Rule 4-642). Another example of a court order that would fall within this exception is an order to seal records in a divorce or custody case.

A rule that permits limited disclosure does not necessarily open a record to the public. For example, Maryland Rule 16-708 b(2) permits disclosure to complainants of information concerning the disposition of their complaints against attorneys. The Court of Appeals held that, although this rule allows limited disclosure to the complainant, it does not make the information subject to general disclosure under the PIA. *Attorney Grievance Commission v. A.S. Abell Co.*, 294 Md. 680, 452 A.2d 656 (1982).

The "privileged or confidential by law" exception under SG §10-615(1) refers to traditional privileges like the attorney-client and attorney work product privileges and the doctrine of grand jury secrecy. For example, the Court of Appeals held that a public defender who was the custodian of a public record consisting of client information must disclose the requested information unless, in doing so, the lawyer would violate Rule 1.6 of the Rules of Professional Conduct. That is, if the requested public record was "information relating to representation of a client" under Rule 1.6, and disclosure would place the attorney in violation of the rule, then the record would be considered confidential under SG §10-615(1). *Harris v. Baltimore Sun Co.*, 330 Md. 595, 625 A.2d 941 (1993); *see also* 64 *Opinions of the Attorney General* 236 (1979) (applying common law doctrine of grand jury secrecy).

Another example of information protected by a recognized privilege is confidential executive communications of an advisory or deliberative nature. *See Office of the Governor v. Washington Post Co.*, 360 Md. 520, 759 A.2d 249 (2000); *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (1980); *Laws v. Thompson*, 78 Md. App. 665, 690-93, 554 A.2d 1264 (1989); 66 *Opinions of the Attorney General* 98 (1981). Not every executive communication is itself advisory or deliberative. In *Office of the Governor*, the Court of Appeals rejected a blanket claim of executive privilege for telephone and scheduling records sought by the newspaper. Because these documents were not of an advisory or deliberative nature, the Governor was not entitled to a presumptive privilege. However, the Court instructed the trial court on remand to consider whether individual records were privileged because disclosure

of particular phone numbers or scheduling records in "identified special circumstances" would interfere with the deliberative process of the Governor's office. The Court recognized that the passage of time might mitigate any harmful effect disclosure might have on the current deliberations of the executive. 360 Md. at 561-65.

The Speech and Debate Privilege provided to legislators by the Maryland Constitution may also prohibit disclosure of records of legislators as well as records of a legislative agency. Letter of Advice to William Ratchford from Assistant Attorney General Richard E. Israel (June 29, 1993). Although the constitutional protections applicable to State legislators do not extend to members of county or municipal governing bodies, they do possess a common law privilege when acting in a legislative capacity that is considered co-extensive in scope. Letter of Advice to Senator David R. Craig from Assistant Attorney General Richard E. Israel (March 4, 1998). *See also* Part D1 below.

The extent of the SG §10-615(2)(i) exception is not clear and produces some interesting questions. For example, can a State agency regulation or county ordinance having the force and effect of law make a class of records confidential? The probable answer is no (except for the special case of "sociological data," discussed in Part C below). Such an interpretation would allow State agencies and local entities at their election to undermine the Act. *Cf. Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983) (for this reason, the court gave little weight to a FDA regulation broadly interpreting the "trade secret" exemption). Additionally, had the General Assembly intended to give this effect to a State regulation or local ordinance, these items would have been included in the list in SG §10-615, which does mention federal regulations.

B. Required Denials) Specific Records

Under SG §10-616, the custodian must deny the inspection of certain specified records. Under SG §10-616, any of these records may be available for inspection if "otherwise provided by law." Thus, if another source of law allows access, then an exception in SG §10-616 does not control. *See* 79 *Opinions of the Attorney General* ___ (1994) [Opinion No. 94-044 (August 23, 1994)] (although personnel records and other information regarding employees in Baltimore City School System would otherwise be nondisclosable, disclosure was authorized by virtue of a federal district court order).

The converse is also true. SG §10-616 may allow access to records but "other law" may deny access. For example, names, addresses, and phone numbers of students may be disclosed to an organization such as a PTA under SG §10-616(k). However, the Family Educational Rights and Privacy Act of 1974, the "Buckley Amendment," 20 U.S.C. §1232(g), is "other law" that supersedes the PIA. Under this federal statute, a student or parent may refuse to allow the student's name and address to be released by refusing to allow it to be classified as directory information. If they do not refuse, the name and address are considered directory information and may be released. As to the types of records protected under the Buckley Amendment, *see Kirwan v. The Diamondback*, 352 Md. 74, 89-94, 721 A.2d 196 (1998) (federal statute governing "education records" does not cover records of parking tickets or correspondence between the NCAA and the University of Maryland, College Park Campus). *Cf. Zaal v. State*, 326 Md. 54, 602 A.2d 1247 (1992) (Family Educational Rights and Privacy Act and Maryland regulations concerning the disclosure of student records do not exclude a student's education records from discovery in litigation).

The following categories of records are listed in SG §10-616:

1. Adoption and welfare records

Under SG §10-616(b) and (c), adoption records and welfare records, respectively, on an individual person are protected. *See* 71 *Opinions of the Attorney General* 368 (1986) (discussing limited conditions under which information about the handling of a child abuse case by a local department of social services may be disclosed).

2. Personnel records

Under SG §10-616(i), "personnel records" of an individual are protected; however, such records are available to the person who is the subject of the record and to the officials who supervise that person.

The PIA does not define "personnel records," but it does indicate the type of documents that are covered: applications, performance ratings, scholastic achievement information. "Although this list was probably not intended to be exhaustive, it does reflect a legislative intent that 'personnel records' means those documents that directly pertain to

employment and an employee's ability to perform a job." *Kirwan v. The Diamondback*, 352 Md. 74, 82-84, 721 A.2d 196 (1998) (rejecting argument that information concerning parking tickets constitutes personnel record). A record is not a "personnel record" simply because it mentions an employee or has some incidental connection with an employment relationship. For example, a record simply indicating with whom an official met or a phone number called in connection with a possible future employment decision is not a personnel record under the PIA. *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 547-48, 759 A.2d 249 (2000).

As to the type of records that are protected, *see* 79 *Opinions of the Attorney General* ___ (1994) [Opinion No. 94-026 (May 9, 1994)] (information related to performance evaluation of judges is not disclosable); 78 *Opinions of the Attorney General* 291 (1993) (information about a complaint filed against an employee is not disclosable). *See also* memorandum to Principal Counsel from Assistant Attorney General Jack Schwartz (January 31, 1995) (information about leave balances is itself considered part of an official's personnel records and therefore is not disclosable). *Cf. Dobronksi v. FCC*, 17 F.3d 275 (9th Cir. 1994) (sick leave records of an assistant bureau chief for FCC were "personnel files" under FOIA Exemption 6 but were disclosable because of that exemption's balancing test, not found in SG §10-616(i)). The personnel file exception is not limited to paid official and employees; biographical information submitted by individuals seeking to serve on agency advisory committees is also protected. *See* Letters of Advice to Senator Brian E. Frosh and Delegate Jennie M. Forehand from Assistant Attorney General Kathryn M. Rowe (October 6, 2000). Records regarding the salaries, bonuses, and the amount of a monetary performance award of public employees may not be withheld as personnel records. 83 *Opinions of the Attorney General* ___ (1998) [Opinion No. 98-025 (December 18, 1998)].

3. Letters of reference

Under SG §10-616(d), letters of reference are protected. This exemption applies to all letters, solicited or unsolicited, that concern a person's fitness for public office or employment. 68 *Opinions of the Attorney General* 335 (1983). The Court of Appeals has left open the question whether a record, memorandum, or notes reflecting a telephone conversation or meeting to obtain information about a prospective appointee might come under the exception. However, a record simply indicating that a telephone conversation or

meeting occurred about a prospective appointee is "certainly not a 'letter of reference.'" *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 547, 759 A.2d 249 (2000).

4. Retirement records

Under SG §10-616(g), retirement files or records are protected. This subsection, however, includes several exceptions. Under ¶4, a custodian must state whether an individual receives a pension or retirement allowance. The law also requires the disclosure of specified information concerning the retirement benefits of current and retired appointed and elected officials. *See* ¶6. Specific provisions are applicable to Anne Arundel County officials. *See* ¶7. Note that ¶3 requires a custodian to permit inspection of retirement files or records if a county by law requires an agency to conduct audits of such records. The employees of the auditing agency must keep all information confidential and must not disclose information that would identify the individuals whose files have been inspected. Retirement records may also be inspected by public employee organizations under conditions outlined in §21-504 of the State Personnel and Pensions Article. *See* ¶5. The law also allows the sharing of certain information for purposes of administering the State's optional defined contribution system in accordance with §21-505 of the State Personnel and Pensions Article. *See* ¶5. A law enforcement agency seeking the home address of a retired employee is entitled to inspect retirement records in order to contact that person on official business. ¶2(iv). Other exceptions authorize access by a person in interest, an employee's appointing authority, and certain persons involved in administering a deceased individual's estate. ¶2(i)(1).

5. Student records

Under SG §10-616(k), school district records pertaining to individual students are protected; however, these records are available to the student and to officials who supervise the student. The custodian may allow inspection of students' home addresses and phone numbers by organizations such as parent, student, or teacher organizations, by a military organization or force, by an agent of a school or board of education seeking to confirm an address or phone number, and by a representative of a community college in the State. *See* Letter of Advice to Senator Victor Cushwa from Assistant Attorney General Christine Steiner (August 14, 1984) (names and addresses of parents of Senatorial Scholarship recipients may not be released; the PIA protects school district records about the family of a student).

6. Library circulation records

Under SG §10-616(e), public library circulation records that identify the transaction of a borrower are protected. *See* Letter of Advice to Delegate John J. Bishop from Assistant Attorney General Richard E. Israel (February 28, 1990) (FBI agents may not inspect library records unless acting pursuant to a lawfully issued search warrant or subpoena).

7. Motor Vehicle Administration records

Under SG §10-616(p), absent written consent of the person in interest, the Motor Vehicle Administration may not disclose "personal information" in response to a request for an individual record or as part of a list sought for purposes of marketing, solicitations, or surveys. "Personal information" is defined as "information that identifies an individual including an individual's address, driver's license number or any other identification number, medical or disability information, name, photograph or computer generated image, Social Security number, or telephone number." SG §10-611(f)(1). However, this definition does not include "an individual's driver's status, driving offenses, 5-digit zip code, or information on vehicular accidents." SG §10-611(f)(2). The statute includes an extensive list of exceptions whereby personal information must be disclosed. The exceptions are modeled in large part after provisions of the federal Driver's Privacy Protection Act, 18 U.S.C. §2721, *et seq*. The Motor Vehicle Administration may not disclose personal information under any circumstances for purposes of "telephone solicitation," a term defined in the PIA. SG §10-611(h).

8. RBC records

Under SG §10-616(l), records that relate to Risk Based Capital reports or plans are protected. All Risk Based Capital reports and Risk Based Capital plans filed with the Insurance Commissioner are to be kept confidential by the Commissioner, because they constitute confidential commercial information that might be damaging to an insurer if made available to competitors. These records may not be made public or subject to subpoena, other than by the Commissioner, and then only for the purpose of enforcement actions under the Insurance Code. *See* §4-310 of the Insurance Article.

9. Arrest warrants

Subject to enumerated exceptions, under SG §10-616(q), a record pertaining to an arrest warrant is not open to inspection until the warrant has been served or 90 days have elapsed since the warrant was issued. An arrest warrant issued pursuant to a grand jury indictment or conspiracy investigation is not open to inspection until warrants for any co-conspirator have been served.

10. Police reports sought for marketing legal services

Under SG §10-616(h), police reports of traffic accidents, criminal charging documents, and traffic citations are not available for inspection by an attorney or an employee of an attorney who requests inspection for the purpose of soliciting or marketing legal services. The federal district court in Maryland has ruled that this provision is of doubtful constitutionality under the First Amendment. *Ficker v. Utz*, Civil Action No. WN-92-1466 (D.Md. Sept. 20, 1992) (order denying motion to dismiss). Subsequently, some courts have upheld state efforts to restrict access to similar public information when sought for commercial purposes while other courts have struck down such restrictions. *See* Letter of Advice to Delegate John A. Giannetti, Jr., from Assistant Attorney General Kathryn M. Rowe (February 28, 2000). *See also Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32, 120 S.Ct. 483 (1999) (rejecting facial challenge to a California statute that restricts access to the addresses of individuals arrested for purposes of selling a product or service).

11. Miscellaneous records

Other public records protected under SG §10-616 include:

! Data obtained by or submitted to the Maryland Transportation Authority in connection with an electronic toll collection system — SG §10-616(m).

! Hospital records relating to medical administration, medical staff, medical care, or other medical information and containing information about one or more individuals — SG §10-616(j).

! Library, archives, and museum material contributed by a private person to the extent that any limitation of disclosure is a condition of the contribution — SG §10-616(f).

! Purchasers and beneficiaries of higher education investment contracts) SG §10-616(n).

! Recorded images produced by traffic control signal monitoring systems used to record vehicles entering an intersection against a red signal) SG §10-616(o).

C. Required Denials) Specific Information

Under SG §10-617, the custodian must deny inspection of the part of a public record that contains the following specific information:

1. Medical, Psychological, and Sociological Data

SG §10-617(b) and (c) prevent disclosure of medical or psychological information and sociological data on individual persons. Medical and psychological information is available for inspection by the person in interest to the extent permitted by Title 4, Subtitle 3 of the Health-General Article. *See* 71 *Opinions of the Attorney General* 297 (1986) (tape recording of involuntary admission hearing may be disclosed only to a patient or authorized representative). SG §10-617(b) does not protect from disclosure autopsy reports of a medical examiner. The "sociological" basis for denial may be used only if an official custodian has adopted rules or regulations that define, for the records within that official's responsibility, the meaning and scope of "sociological data." The Division of Parole and Probation of the Department of Public Safety and Correctional Services, for example, has adopted regulations (COMAR 12.11.02.02.M) that define "sociological data." While the Act itself does not define "sociological data," it seems unlikely that the Legislature meant for agencies to withhold aggregate statistical compilations under this provision.

2. Trade Secrets and Other Financial Information

SG §10-617(d) prevents disclosure of trade secrets, confidential commercial or financial information, and confidential geological or geophysical information, if that information is furnished by or obtained from any person or governmental unit. The comparable FOIA exemptions are similar. Under 5 U.S.C. §552(b)(4), the government need not disclose "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential." In addition, 5 U.S.C. §552(b)(9) protects "geological and geophysical information and data, including maps concerning wells ...." The geological or geophysical data provision obviously is limited in scope and in practice applies only to a few Maryland agencies.

Federal cases and FOIA legislative history are highly persuasive in interpreting SG §10-617(d). 63 *Opinions of the Attorney General* 355 (1978). Sources on the scope and extent of the related FOIA exemption include: O'Reilly, *Federal Information Disclosure*, Chapters 14 and 18 (2d ed. 1999); 21 A.L.R. Fed. 224; and 27 A.L.R. 4th 773. One of the few Attorney General's opinions on this subject defines a "trade secret" as:

> [A]n unpatented secret formula or process known only to certain individuals using it in compounding some article of trade having commercial value. Secrecy is the essential element. Thus, "[a] trade secret is something known to only one or a few, kept from the general public, and not susceptible of general knowledge. If the principles incorporated in a device are known to the industry, there is no trade secret ...."

63 *Opinions of the Attorney General* 355, 359 (1978) (footnotes and citations omitted). *See Space Aero Products Co. v. R.E. Darling Co.*, 238 Md. 93, 208 A.2d 699 (1965). *But see Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983).

Often the more difficult inquiry is what constitutes confidential commercial or financial information. To fit within SG §10-617(d), the information must be of a commercial or financial nature and it must be obtained from a person outside the agency or from another governmental unit. Information generated by the agency itself is not covered by SG §10-617(d), but it may be protected from disclosure by a different exception. *See Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979).

In addition, a record is not confidential commercial or financial information simply because it was generated in the course of a transaction or has some other indirect connection to commercial activity. In *Office of the Governor v. Washington Post Co.,* for example, the Court of Appeals held that a record of a telephone call about an economic development project does not itself constitute confidential commercial information, although notes detailing the substance of the discussion might. 360 Md. 520, 549, 759 A.2d 249 (2000)

The problem of determining whether a document reflects confidential commercial or financial information frequently arises as a consequence of procurement bid protests. The following cases that apply FOIA Exemption 4 may be helpful in this context: *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981) (substantial cost savings to competitors through FOIA access to data may result in substantial competitive harm to data submitter); *Orion Research Inc. v. EPA*, 615 F.2d 551 (1st Cir. 1980) (disclosure of bid proposal would have chilling effect on willingness of potential bidders to submit future proposals); *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1980) (ability of competitors to calculate data submitter's future bids and pricing structure would be substantial competitive harm); *Environmental Technology, Inc. v. EPA*, 822 F. Supp. 1226 (E.D. Va. 1993) (unit price information voluntarily provided by government contractor to procuring agency was "confidential" and not subject to disclosure under FOIA, where information was of a kind that contractor would not customarily share with competitors); *Allnet Comm. Services, Inc. v. FCC*, 800 F. Supp. 984 (D.D.C. 1992) (proprietary cost and engineering data voluntarily provided by switch vendors to telecommunications companies under nondisclosure agreements were confidential under FOIA); *Cohen, Dunn & Sinclair v. General Services Administration*, Civ. No. 92-57-A (E.D. Va. Sept. 10, 1992) (pricing information was exempt because of deterrent effect on future bids and because disclosure would result in severe economic harm to some bidders); *Audio Technical Services Ltd. v. Department of the Army*, 487 F. Supp. 779 (D.D.C. 1980) (successful bidder's customer list, design concepts and recommendations, and biographical data on key employees were exempt).

Financial or commercial information that persons are *required* to give the government should be considered confidential if disclosure of the information is likely to have either of the following effects:

> (1) to impair the government's ability to obtain the necessary information in the future; or
>
> (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks & Conservation Assoc. v. Morton, 498 F.2d 765, (D.C. Cir. 1974). Commercial or financial information that is given to the government *voluntarily* should be considered confidential "if it is of the kind that the provider would not customarily release to the public." *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). In general, the submitter of such material should be consulted *before* it is disclosed to a requester.

An opinion of the Attorney General concluded that construction drawings, submitted to a county as a prerequisite to issuance of a building permit, could not be protected from disclosure on the grounds that release would impair the government's ability to obtain the necessary information in the future. The opinion suggested that release of such drawings should be examined on a case-by-case basis, however, to determine whether disclosure would give competitors a concrete advantage in obtaining future work on that or a similar project. 69 *Opinions of the Attorney General* 231 (1984). *See also Progressive Casualty v. MAIF*, No. 83/E/1074 (Cir. Ct. for Balt. Co., February 15, 1984) (coverage and premium calculations of Maryland Automobile Insurance Fund's insureds held to be confidential commercial and financial data).

3. Home Addresses and Phone Numbers of Public Employees

SG §10-617(e) prevents disclosure of the home address or telephone number of a public employee unless the employee consents or the employing unit determines that inspection is needed to protect the public interest. Thus, the home telephone number of a State employee would be redacted from records otherwise available to a requestor. *See Office of the Governor v. Washington Post Co.*, 360 Md. 520, 550, 759 A.2d 249 (2000). Public employee organizations are permitted greater access under certain conditions outlined in §21-504 of the State Personnel and Pensions Article. Also, if a public employee is a licensee, members of the General Assembly may obtain the licensee's home address pursuant

to SG §10-612(c). *See* Letter of Advice to Michael A. Noonan, Esquire, from Assistant Attorney General Robert A. Zarnoch (December 23, 1993); Letter of Advice to Dr. William AuMiller from Assistant Attorney General Robert A. Zarnoch (November 29, 2000) (State legislators are entitled to names and addresses of teachers and other certified employees of county boards of education).

4. Records of an Individual Person's Finances

SG §10-617(f) protects from disclosure the part of a public record that contains information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or credit worthiness. SG §10-617(f)(2). This exception explicitly does *not* apply to the actual compensation, including any bonus, paid to a public employee. SG §10-617(f)(1); 83 *Opinions of the Attorney General* ___ (1998) [Opinion No. 98-025 (December 18, 1998)].

Although the PIA does not define financial information, the listing in SG §10-617(f)(2) illustrates the type of financial information that the Legislature intended to protect. *Kirwan v. The Diamondback*, 352 Md. 74, 721 A.2d 196 (1998) (because the sanction for a parking violation is a fine rather than a debt, records of parking tickets do not fall in the same category as information about "assets, income, liabilities, net worth, bank balances, financial history or activities, or credit worthiness"). *See also* 77 *Opinions of the Attorney General* 188 (1992) (value or description of abandoned property should not be disclosed because it constitutes personal financial information); Opinion No. 85-011 (April 15, 1985) (unpublished) (names of municipal bond holders should not be disclosed because they constitute information about a particular financial interest of an individual); Memorandum from Jack Schwartz to Principal Counsel (August 17, 1995) (information that an individual was a lottery winner is considered a record of an individual person's finances and the Lottery Agency was prohibited from disclosing to the press the individual's identity). *See also* 71 *Opinions of the Attorney General* 282 (1986) (county ethics ordinance requires disclosure of information ordinarily non-disclosable under SG §10-617(f)).

The rationale for this provision was explained by the Governor's Information Practices Commission:

> In the performance of their duties, public agencies quite properly collect a significant amount of detailed financial information pertaining to individuals. This data is [*sic*] essential in determining eligibility for State scholarship programs, income maintenance benefits, subsidized housing programs, and many other areas.
>
> While the Commission recognizes that this data must be available to agencies, this does not mean that such information should be available to third parties....
>
> The Commission ... recommends that an amendment be added to the Public Information Act specifying that personally identifiable data which is financial in character not be disclosed, unless otherwise provided by law. It is important to emphasize the last phrase, "unless otherwise provided by law." Enactment of the above recommendation would have no impact whatsoever on those personally identifiable financial records which the Legislature has determined should be available for public inspection. For example, the salaries of public employees would continue to be available under the Public Information Act; the Commission completely supports the disclosure of this information. The Commission's recommendation, therefore, would only affect financial data in those record systems, ... which have been inadvertently disclosed.

Governor's Information Practices Commission, Final Report 534-35 (1982).

5. Occupational and Professional Licensing Records

SG §10-617(h) contains a general privacy protection for occupational and professional licensing records on individual persons. Again, this amendment resulted from a recommendation of the Governor's Information Practices Commission. In explaining its recommendation, the Commission stated:

> The observation was made earlier in this report that the formulation of sound public policy in the area of information practices requires the striking of a delicate balance among competing interests. The occupational and professional licensing field provides a good illustration of this dictum. The various licensing boards throughout the State need to collect a sufficient amount of personally identifiable information in order to assess the qualifications of

candidates. The public has a right to examine certain items in licensure files to be assured that specific licensees are competent and qualified. Licensees, in turn, have a right to expect that boards limit themselves to the collection of relevant and necessary information, and that strict limitations are placed on the type of personally identifiable data available for public inspection.

. . .

The Information Practices Commission has invested a considerable amount of time and energy in attempting to determine which data elements pertinent to licensees should be available for the public, and which items should be confidential. The Commission believes that its recommendations constitute a careful balancing of the access rights of the public and the privacy rights of licensees. The Commission asserts that the public has a right to have access to basic directory information about a licensee, should it need to contact the licensee. The Commission believes, however, that under usual circumstances, the business address and business telephone number should be disclosed rather than residential data. If, however, the board cannot furnish the business address, it should make the licensee's home address available to the public. The commission furthermore asserts that the public has a right to examine a licensee's educational and occupational background and professional qualifications. Before hiring a plumber, for example, an individual should have the right to assess the plumber's credentials as presented to the Department of Licensing and Regulation. The Commission also believes that the public has a right to know the nature of non-pending complaints directed to boards against specific licensees. If a board has determined that a licensee was guilty or culpable of some unfair or illegal practice and subsequently took disciplinary action against that licensee, the public has a right to know that as well. Finally, if a licensee is required by statute to provide evidence of financial responsibility, that evidence should also be available for public inspection. This latter issue is of particular importance in the home improvement field.

The Commission does not believe that the release of other personally identifiable information pertinent to licensees would serve the public interest.... The Commission recognizes that there may be extenuating circumstances in which a compelling public purpose

> would be served by the release of data in addition to that recommended by the Commission. The Commission believes that discretionary authority should be given to records' custodians to release additional data; however, custodians should be required to issue rules and regulations explaining the need and the basis for disclosure.

Governor's Information Practices Commission, Final Report 535-38 (1982). The Department of Labor, Licensing, and Regulation has concluded that "a compelling public interest" is served by disclosure of, among other information, the number, nature, and status of complaints against a licensee, if the requester is contemplating a contract with the licensee. COMAR 09.01.04.13.

6. Records Containing Investigatory Procurement Information

SG §10-617(i) prohibits the disclosure of any part of a public record that contains procurement information generated by the federal government or another state as a result of an investigation into suspected collusive or anticompetitive activity on the part of a transportation contractor. The reason for the exemption was explained as follows:

> The Department of Transportation advises that if it receives the result of an investigation into suspected bid rigging activity on the part of a potential contractor, which investigation was conducted by the federal government or another State, that information is subject to disclosure under the Maryland Public Information Law. As a result, these sources have been unwilling to share this information with Maryland officials.
>
> House Bill 228 would provide assurances to these sources that the information provided to Maryland investigators will remain confidential and not be subject to disclosure. Section 10-617 of the State Government Article, to which the bill is drafted, limits access to a part of a public record. This means that the results of the Maryland investigation would be public information, except for those parts which relate to the information gathered from the confidential sources. As a result, the MDOT will have access to a greater range of information when conducting its own investigation into collusive or anticompetitive activity.

Bill Analysis, House Bill 228 (1994).

7. Miscellaneous Information

Other public information protected under SG §10-617 includes:

- Information about system security manuals — SG §10-617(g).

- Certain information about the application and commission of a notary public — SG §10-617(j).

D. Discretionary Exceptions

Under SG §10-618, a custodian *may* deny the right of inspection to certain records or parts of records, but only if disclosure would be contrary to the "public interest." These records are:

- Interagency or intra-agency memoranda or letters that would be privileged in litigation — SG §10-618(b).

- Testing records for academic, employment, or licensing examinations — SG §10-618(c).

- Specific details of a research project that an institution of the State or of a political subdivision is conducting — SG §10-618(d).

- Contents of a real estate appraisal made for a public agency about a pending acquisition (except from the property owner) — SG §10-618(e).

- Records of investigation, intelligence information, security procedures, or investigatory files — SG §10-618(f).

- Site-specific location of certain plants, animals, or property — SG §10-618(g).

- Information relating to an invention owned by a State public institution of higher education) SG §10-618(h).

- Information relating to a trade secret, confidential commercial information, or confidential financial information owned by the Maryland Technology Development Corporation) SG §10-618(i).

A "person in interest," generally the person who is the subject of the record, SG §10-611(e), has a greater right of access to the information contained in investigation and testing records. SG §10-611(e). *See* Part IIA above.

Whether disclosure would be "contrary to the public interest" under these exceptions is in the custodian's "sound discretion," to be exercised "only after careful consideration is given to the public interest involved." 58 *Opinions of the Attorney General* 563, 566 (1973). In making this determination, the custodian must carefully balance the possible consequences of disclosure against the public interest in favor of disclosure. 64 *Opinions of the Attorney General* 236, 242 (1979).

1. Inter- and Intra-Agency Memoranda and Letters

SG §10-618(b) allows a custodian to deny inspection of "any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit." This exemption "to some extent reflects that part of the executive privilege doctrine encompassing letters, memoranda, or similar internal government documents containing confidential opinions, deliberations, advice or recommendations from one governmental employee or official to another for the purpose of assisting the latter official in the decision-making function." *Office of the Governor v. Washington Post Company*, 360 Md. 520, 551, 759 A. 2d 249 (2000). *See also* 66 *Opinions of the Attorney General* 98 (1981) (executive agency budget recommendations requested by and submitted to the Governor in confidence are subject to executive privilege).

This exception is very close in wording to the FOIA exemption in 5 U.S.C. §552(b)(5), and the case law developed under that exemption is highly persuasive in interpreting SG §10-618(b). 58 *Opinions of the Attorney General* 53 (1973). The FOIA

exemption is "intended to preserve the process of agency decision-making from the natural muting of free and frank discussion which would occur if each voice of opinion and recommendation could be heard and questioned by the world outside the agency." 1 O'Reilly, *Federal Information Disclosure* §15.01 (2d ed. 1999).

To be an "interagency" or "intra-agency" letter or memorandum, the document must have been "created by government agencies or agents, or by outside consultants called upon by a government agency 'to assist it in internal decisionmaking.'" *Office of the Governor*, 360 Md. at 552 (quoting *County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981)). Maryland law follows FOIA in this regard. *See also Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985).

This exception does not apply to all agency documents. A document such as a telephone bill or a listing of persons who have appointments with an official cannot be considered a "letter or memorandum" under the "ordinary meaning" of those terms. *Office of the Governor*, 360 Md. at 552. Nor does the exception apply to all memoranda or letters. For it to apply, the agency must have a reasonable basis for concluding that disclosure would inhibit creative debate and discussion within or among agencies or would impair the integrity of the agency's decision-making process. *NLRB v. Sears*, 421 U.S. 132, 151 (1975).

Generally, the exception protects pre-decisional, as opposed to post-decisional, materials. *City of Virginia Beach v. Department of Commerce*, 995 F.2d 1247 (4th Cir. 1993); *Bristol-Myers Co. v. FTC*, 598 F.2d 18, 23 (D.C. Cir. 1978). For example, a State agency's annual report on waste, fraud, and abuse submitted to the Governor is protected as a pre-decisional document, because it presents the Governor with recommendations for correcting these problems that the Governor may approve or disapprove; it does not reflect agency policy or an agency's final opinion. Letter to Anthony Verdecchia, Legislative Auditor, from Mary Ann Saar, Director of Operations in the Office of the Governor (July 17, 1990). Once an agency's decision has been made, the records embodying the decision or policy, and all subsequent explanations and rationales, are available for public inspection. Pre-decisional, deliberative materials remain protected, however, even after the final decision is made. *May v. Department of the Air Force*, 777 F.2d 1012 (5th Cir. 1985) (so long as the information in question was created prior to the particular decision that was involved, it can retain its privileged status long after the decision-making process has concluded).

The exception is also meant to cover only the deliberative parts of agency memoranda or letters. Generally, it does not apply to records that are purely objective or factual or to scientific data. *EPA v. Mink*, 410 U.S. 73 (1973). Factual information is not disclosable, however, if it can be used to discover the mental processes of the agency, *Dudman Communications Corp v. Department of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); reflects "investigative facts underlying and intertwined with opinions and advice," *Office of the Governor*, 360 Md. at 559 (quoting *Hamilton v. Verdow*, 287 Md. 544, 565 (1980)); or when disclosure of the information might deter the agency from seeking valuable information, *Quarles v. Department of the Navy*, 893 F.2d 390 (D.C. Cir. 1990). The FOIA exemption has also been construed to protect some government-generated confidential commercial information. *Federal Reserve System v. Merrill*, 443 U.S. 340 (1979).

The difficulty of applying the SG §10-618(b) exception to the myriad of agency-generated documents is obvious. We suggest that a presumption of disclosure should prevail, unless the responsible agency official can demonstrate specific reasons why agency decision-making may be compromised if the questioned records are released. In applying the deliberative process privilege, an agency should determine whether disclosure of the requested information "would actually inhibit candor in the decision-making process if made available to the public." *Army Times Publishing Co. v. Department of the Air Force*, 998 F.2d 1067 (D.C. Cir. 1993). Unless specific reasons can be articulated, the agency decision to withhold documents may be overturned by the courts.

In *Cranford v. Montgomery County*, 300 Md. 759, 481 A.2d 229 (1984), the Court of Appeals vacated a decision by the Court of Special Appeals upholding an agency's decision to withhold documents. The Court of Appeals stated that the agency's proffered justification was too general and conclusory. It recognized the value of what has come to be called a *Vaughn* index, after the leading federal case, *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The Court of Appeals also cited the failure of the courts below to analyze the agency memoranda exemption in relationship to discovery of particular documents and suggested that the lower courts had put too much emphasis on the public policy justification for nondisclosure. The Court agreed that reports prepared by outside consultants in anticipation of litigation are not routinely discoverable and may be protected from disclosure under the inter-agency and intra-agency documents exemption. *Cranford*, 300 Md. at 784. If the expert who made the report is to be called at trial, however, the report is not protected,

because it is discoverable under Rule 2-402(e)(1), which requires a party to "produce any written report made by the expert concerning those findings and opinion ...." 300 Md. at 775.

Maryland Attorney General opinions on this exception are 58 *Opinions of the Attorney General* 53 (1975) and No. 75-202 (December 1, 1975) (unpublished). Sources on the scope and extent of the FOIA exemption are: 1 Davis and Pierce, *Administrative Law Treatise* (3rd ed. §5.11); 1 O'Reilly, *Federal Information Disclosure*, Ch. 15 (2d ed. 1999); and 7 A.L.R. Fed. 855.

2. Testing Data

SG §10-618(c) allows a custodian to deny access to testing data for licensing, employment or academic examinations. For promotional examinations, however, a person who took the exam is given a right to inspect, but not copy, the examination and its results.

3. Research Projects

The specific details of an ongoing research project conducted by an institution of the State or a political subdivision (*e.g.* medical research project) need not be disclosed by the custodian. SG §10-618(d). Only the name, title, expenditures, and the time when the final project summary will be available must be disclosed. *See* 58 *Opinions of the Attorney General* 53, 59 (1973) for an application of this exception to a consultant's report. *See also* Letter of Advice to Leon Johnson, Chairman, Governor's Commission on Migratory and Seasonal Labor, from Assistant Attorney General Catherine M. Shultz (August 8, 1985) (census information revealing individual migrants' names may be protected under this subsection.)

4. Real Estate Appraisals

Under SG §10-618(e), the contents of a real estate appraisal made for a covered governmental entity need not be disclosed until title has passed to that entity. However, the contents of the appraisal are available to the owner of the property at any time, unless some other statute would prohibit access.

5. Investigatory Records

SG §10-618(f) permits the withholding of certain investigatory records and records that contain intelligence information and security procedures. The determinations required of the custodian vary depending on the particular records at issue.

For seven named law enforcement agencies, the custodian may deny the right of inspection of records of investigations conducted by the agency, intelligence information, or security procedures. The seven listed agencies are: any sheriff or police department, any county or city attorney, a local correctional facility, State's Attorney, or the Attorney General's office. Although not listed in SG §10-618(f)(1), the State Prosecutor is considered in the same category as a State's Attorney. *Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 737 A.2d 592 (1999).

Not every record in the possession of the law enforcement agency constitutes a record of an investigation. *See, e.g.*, 71 *Opinions of the Attorney General* 288 (1986) (recordings of 911 calls generally not investigatory records); 63 *Opinions of the Attorney General* 543 (1978) (arrest logs not investigatory records).

When the records in question are investigatory, and when they come from one of these enumerated agencies, the exception applies without need for an actual showing that the records were compiled for law enforcement or prosecution purposes. The Court of Appeals has held that the investigatory records of one of the seven enumerated agencies are presumed to be for law enforcement purposes. *Superintendent v. Henschen*, 279 Md. 468, 369 A.2d 558 (1977). Thus, an enumerated agency need not make a particularized showing of a law enforcement purpose to justify the withholding of a record relating to a criminal investigation. *See Office of the State Prosecutor*, 356 Md. 118.

On the other hand, the investigatory files of other agencies are exempt from disclosure only if there is a demonstration that the agency compiled them for a law enforcement, judicial, correctional, or prosecution purpose. Where files are prepared in connection with government litigation, and adjudicative proceedings are currently under way or contemplated, they are compiled for law enforcement purposes. *Equitable Trust Co. v. State Human Relations Comm'n*, 42 Md. App. 53, 399 A.2d 908 (1979), *rev'd on other grounds*,

287 Md. 80 (1980). An agency, however, has the burden of demonstrating that it meets this criterion. *Fioretti v. State Board of Dental Examiners*, 351 Md. 66, 82, 716 A.2d 258 (1998) ("The agency must, in each particular PIA action, demonstrate that it legitimately was in the process of or initiating a specific relevant investigative proceeding in order to come under the aegis of the exemption.") Even if the agency makes such a showing, when the agency asserts that disclosure would "prejudice an investigation," the agency may be required to make a particularized showing of prejudice. *Fioretti*, 351 Md. at 268-70; *but see Fioretti*, 351 Md. at 271-73 (Raker, J., concurring) (characterizing latter holding as "dicta"). *See also Bowen v. Davison*, 2000 W.L. 1673383 (Ct. Spec. App. Nov. 8, 2000). For further discussion of satisfying the agency's burden when withholding investigatory records, *see* Part IV.F.3 below.

Maryland's current investigatory records exception is similar to the investigatory records exemption in FOIA, 5 U.S.C. §552(b)(7), and the case law developed under that exemption should be of assistance in interpreting SG §10-618(f). *Faulk v. State's Attorney for Harford County*, 299 Md. 493, 474 A.2d 880 (1984). FOIA cases also discuss criteria for determining whether a record was compiled for law enforcement purposes. *See, e.g.*, *Rosenfeld v. Department of Justice*, 57 F.3d 803 (9th Cir. 1995), *cert. dismissed*, 516 U.S. 1103 (1996) (where compiling agency has clear law enforcement mandate, government has easier burden to establish that record it seeks to withhold was compiled for law enforcement purposes; under these circumstances, the government need only establish rational nexus between the enforcement of federal law and the document for which the law enforcement exemption is claimed).

A custodian of investigatory records must nonetheless disclose them to any person, unless the custodian determines that disclosure would be "contrary to the public interest" or unless other law would prevent disclosure. For example, the Court of Appeals held that it would be contrary to the public interest to disclose an internal investigation report of a police officer by the Baltimore City Police Department. Disclosure of an internal report would discourage witnesses or other persons with information from cooperating. *Mayor and City Council of Baltimore v. Maryland Committee Against the Gun Ban*, 329 Md. 78, 617 A.2d 1040 (1993). *See also* 77 *Opinions of the Attorney General* 183 (1992) (custodian of an investigatory record containing the name and address of a crime victim would be required under the PIA to consider the assertions of the public interest made by the requester, as well

as the privacy interests of the victim); 64 *Opinions of the Attorney General* 236 (1979) (police department need not disclose police investigative report to the extent that disclosure would be contrary to the public interest).

Under SG §10-618(f)(2), however, the "person in interest" is entitled to inspect investigatory records of which he or she is the subject unless production would:

(a) interfere with valid and proper law enforcement proceedings;

(b) deprive another person of a right to a fair trial or an impartial adjudication;

(c) constitute an unwarranted invasion of personal privacy;

(d) disclose the identity of a confidential source;

(e) disclose investigate techniques or procedures;

(f) prejudice an investigation; or

(g) endanger the life or physical safety of an individual.

See generally Mayor and City Council of Baltimore v. Maryland Committee Against the Gun Ban, 329 Md. 78, 617 A.2d 1040 (1993); *Briscoe v. Mayor and City Council of Baltimore*, 100 Md. App. 124, 640 A.2d 226 (1994); 81 *Opinions of the Attorney General*___ [Opinion No. 96-003 (January 31, 1996)].

The number and wide scope of these factors will often lead to a denial of disclosure by the law enforcement agency, especially where records have been recently obtained and are in active use in investigations. The seven factors listed above may also be considered as part of the "public interest" determination in deciding whether to deny access to a person who is not a person in interest. Indeed, under limited circumstances one of these factors might even justify an agency's refusal to confirm or deny that a record exists. *Beck v. Department of Justice*, 997 F.2d 1489 (D.C. Cir. 1993) (personal privacy of drug agent

would be needlessly invaded if agency confirmed that record of misconduct investigation existed). Other reasons not listed could also justify nondisclosure to a person who is not a person in interest. 64 *Opinions of the Attorney General* 236 (1979).

The focus of the provision that protects the identity of a confidential source is not on the motivation of the requestor or the potential harm to the informant. "Rather, the purpose of the exception is to assist law enforcement officials in gathering information by ensuring reluctant sources that their identities would not be disclosed." *Bowen v. Davison*, 2000 WL 1673383 (Ct. Spec. App. Nov. 8, 2000) slip op. at p. 15. The Supreme Court has held that a law enforcement agency is not entitled to a presumption that all sources supplying information to that agency in the course of a criminal investigation are "confidential sources" within the FOIA exception for investigatory records. Rather, only some narrowly defined circumstances provide a basis for inferring confidentiality, as when paid informants expect their information to remain confidential. *Department of Justice v. Landano*, 508 U.S. 165 (1993). Thus, there must be an express or implied assurance of confidentiality to the informant. *Bowen v. Davison, supra*, at p. 15. *See also* 17 A.L.R. Fed. 522.

Although a "person in interest" is entitled to inspect certain investigatory records that may be denied to third parties, the person in interest's rights under SG§10-618(f)(2) do not override other exemptions under the PIA that might justify withholding the records. *Office of the Attorney General v. Gallagher*, 359 Md. 341, 753 A.2d 1036 (2000).

6. Location of Plants, Animals, or Property

SG §10-618(g) allows a custodian to deny inspection of a record that contains the location of an endangered or threatened species of plant or animal, plants and animals in need of conservation, a cave, or an historic property. However, this provision does not authorize the denial of information requested by the property owner or by any entity authorized to take the property through condemnation.

7. Inventions Owned by Higher Education Institutions

Under SG §10-618(h), information disclosing or relating to an invention owned in whole or in party by a State public institution of higher education need not be disclosed for a limited period. The purpose of this exception is to allow the institution an opportunity to

evaluate whether to patent or market the invention and pursue economic development and licensing opportunities. However, this exception does not apply if the information has been published or disseminated by the inventors in the course of their academic activities or if it has been disclosed in a published patent. The exception also does not apply if the invention has been licensed by the institution for at least four years, or if four years have elapsed from the date of the written disclosure of the invention to the institution.

8. Certain Information Owned by the Maryland Technology Development Corporation

SG §10-618(i) allows protection of trade secret, confidential commercial information, and confidential financial information owned, in whole or in part, by the Maryland Technology Development Corporation.

E. Special Court Orders — Preventing Disclosure Where No Exception Applies

A record required to be disclosed under the PIA may be withheld temporarily if the official custodian determines that disclosure would do "substantial injury to the public interest." SG §10-619. The official custodian must, within 10 days of this denial, file an action in the appropriate circuit court seeking an order to permit the continued denial of access. The person seeking disclosure is entitled to notice of the action and has the right to appear and be heard before the circuit court. SG §10-619(c). An official custodian is liable for actual damages, and any punitive damages that the court considers appropriate, for failure to petition the court for an order to continue a denial of access under this provision. SG §10-623(d)(2).

After a hearing, the court must make an independent finding that "inspection of the public record would cause substantial injury to the public interest." For example, the Circuit Court for Baltimore City concluded that potential competitive injury to the Port of Baltimore and BWI Airport justified withholding an agreement between the State and the government of Kuwait regarding the use of State facilities in the post-war reconstruction of Kuwait. *Evans v. Lemmon*, No. 91162022 (Cir. Ct. Balto. City July 31, 1991). On the other hand, the Court of Special Appeals concluded that Baltimore City had no basis under SG §10-619 to withhold documents concerning the construction of the Patapsco Waste Water Treatment Plant. The Court held that the tactical disadvantage that the City might suffer in arbitration

proceedings with the construction company was insufficient to establish the substantial injury to the public interest needed to protect records under this section. *City of Baltimore v. Burke*, 67 Md. App. 147, 506 A.2d 683, *cert. denied*, 306 Md. 118, 507 A.2d 631 (1986).

Agencies should remember that, by seeking the SG §10-619 remedy, they are foreclosed from an administrative determination that the records sought are subject to a statutory exception (although the agency may not be barred from simultaneously seeking a declaratory judgment that an exception applies). In *Burke*, the Baltimore City Department of Public Works lost its right to continue to assert the inter/intra-agency exemption when it sought relief from disclosure under SG §10-619. *Burke*, 67 Md. App. at 152. Therefore, this remedy should be viewed as an extraordinary one, requiring careful consultation with counsel before a decision is made to bring a SG §10-619 action.

F. Severability of Exempt from Non-Exempt

The fact that some portions of a particular record may be exempt from disclosure does not mean that the entire record may be withheld. If a record contains exempt and non-exempt material, the custodian must permit inspection of any "reasonably severable" non-exempt portion of a record. SG §10-614(b)(3)(iii). If exempt portions of the document are inextricably intertwined with nonexempt portions, however, so that excision of the exempt information would impose significant costs on the agency and the final product would contain very little information, then the agency may deny inspection of the record. *See Nadler v. Department of Justice*, 955 F.2d 1479 (11th Cir. 1992) (factual material may be withheld when it is impossible to segregate it in a meaningful way from deliberative information.) *See also Newfeld v. IRS*, 646 F.2d 661 (D.C. Cir. 1981). If the agency decides that non-exempt information is not reasonably segregable, it has the burden of showing this in a non-conclusory affidavit. *Wilkinson v. FBI*, 633 F. Supp. 336 (C.D. Cal. 1986).

G. Relationship of Exceptions to Civil or Criminal Discovery

Demands on custodians for documents for civil or criminal trials raise questions about the relationship of judicial discovery rules to the SG §§10-616, 10-617 and 10-618 exceptions. *See* Tomlinson, *The Use of the Freedom of Information Act for Discovery Purposes*, 43 Md. L. Rev. 119 (1984). For instance, must an agency resist discovery where

the information sought is protected from disclosure by a mandatory or discretionary exception?

In the only reported decision on this precise issue, *Boyd v. Gullett*, 64 F.R.D. 169 (D. Md. 1974), the court held that the exceptions in the PIA do not create privileges for purposes of the federal discovery rules. In reaching this decision, the court relied on analogous cases under FOIA:

> The intention of Congress and presumably the Maryland Legislature was to increase public access to government information. Both acts provide that "any person" has the right to non-exempt materials, and the exemptions are merely reasonable limitations on this broad right of "any person" to request information. It would not be reasonable to view such acts as creating new privileges where privileges never existed. Indeed, such an interpretation would result in a restriction of public access to government information. Such a paradoxical result could not have been intended by the Maryland Legislature by its passage of [the PIA], and the Court is satisfied that the exemptions in the statute do not create privileges for the purposes of discovery.

64 F.R.D. at 177-78.

While a custodian, with advice of counsel, should make records available pursuant to appropriate civil discovery requests, care should be taken to protect records affecting individual privacy interests from broader disclosure than necessary by seeking, or inviting those who are affected to seek, protective orders limiting further disclosure of the record to the parties in the litigation. Often a protective order can be structured in such a manner that relevant information is provided but other information is protected from discovery thereby maximizing the protection of the PIA. Note that the General Assembly has explicitly made certain records not discoverable in civil or criminal trials. *See, e.g.*, §14-410 of the Health Occupations Article.

Just as the PIA does not narrow the scope of discovery, neither does the PIA expand it. In *Faulk v. State's Attorney for Harford County*, 299 Md. 493, 474 A.2d 880 (1984), the Court of Appeals held that the PIA does not expand the right of discovery available to a criminal defendant under Maryland Rule 741 (current Rule 4-263); *see also Office of*

Attorney General v. Gallagher, 359 Md. 341, 347-48, 753 A.2d 1036 (2000). The pendency of criminal proceedings triggers the SG §10-618(f) exemption, which shields investigatory records from disclosure to an accused. The Court adopted the reasoning of *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), in which the Supreme Court stated that FOIA was not intended to function as a private discovery tool.

H. Reverse PIA Actions

A special feature of the exceptions in SG §§10-616 and 10-617 is that they impose an obligation on the custodian to deny inspection of the listed records or information: "Unless otherwise provided by law, a custodian *shall* deny inspection of a public record ..." (emphasis added). If the custodian decides to release information or records that might be covered by SG §§10-616 or 10-617, the question arises whether the subject of a record or the person submitting a record may bring suit to prevent such a disclosure. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Supreme Court decided that FOIA does not afford a private right of action to prohibit disclosure of information covered by 5 U.S.C. §552(b). Rather, a reverse FOIA action is generally brought under the federal Administrative Procedures Act, with the claim that the agency's decision to release the document was "arbitrary and capricious."

SG §§10-616 and 617 differ from FOIA in this significant respect: the PIA prohibits the disclosure of the records, whereas FOIA allows disclosure even if an exemption could be asserted. Consequently, a "reverse PIA" action (one to prevent rather than allow disclosure) may be authorized in Maryland despite the *Chrysler* case. If a custodian proposes to release a document arguably covered under SG §§10-616 or 10-617, the custodian should usually contact the person potentially affected by release so that the person may advise the custodian of his or her views and potentially seek judicial intervention to protect the record from disclosure. In the event of judicial intervention, the custodian or the agency should produce an administrative record that reveals why it decided to release the document, if that document may be covered under SG §§10-616 or 10-617. *Cf. Reliance Elec. v. Consumer Product Comm'n*, 924 F.2d 274 (D.C. Cir. 1991).

IV

Request Procedures

A. *Written Request*

The PIA envisions a written request. SG §10-614. Nevertheless, an agency need not and should not demand written requests for inspection of agency documents when there is no question that the public has a right to inspect them. For example, an agency's annual report and the agency's quarterly statistics are clearly open to the public for inspection. Moreover, a request expressing a desire to inspect or copy agency records may be sufficient to trigger the PIA requirements, even if it does not expressly mention the words "Public Information Act" or cite the applicable sections of the State Government Article.

In general, there is no requirement that the applicant give the reason for a request or identify him or herself, although he or she is certainly free to do so. The reasons that the information is sought are generally not relevant. *See Moberly v. Herboldsheimer,* 276 Md. at 227; 61 *Opinions of the Attorney General* 702, 709 (1976). These reasons might be pertinent, however, if the applicant seeks a waiver of fees. *See* Part IIG above. In addition, the identity of an applicant is relevant if he or she is seeking access in one of the particular situations where the PIA gives "persons in interest" special rights of access.

While there is no requirement that an applicant give a reason for the request, the request must sufficiently identify the records that the applicant seeks. *See* letter of advice to Deborah Byrd, Dorchester County Commissioner's Office, from Assistant Attorney General Kimberly Smith Ward (May 7, 1996) (PIA request must sufficiently identify records so as to notify agency of records that the applicant wishes disclosed). *See also Sears v. Gottschalk,* 502 F.2d 122 (4th Cir. 1974), *cert. denied*, 422 U.S. 1056 (1975) (FOIA calls for reasonable description, enabling government employee to locate requested records). In some instances, applicants may have only limited knowledge of the types of records the agency has and may not be able to describe precisely the records they seek. An agency may appropriately assist an applicant to clarify a request when feasible.

Generally, an agency may not require the Legislative Auditor to submit a written request pursuant to the PIA. However, if an employee of the Legislative Auditor requests

information from an agency that is not the subject of the audit without stating an organizational affiliation and without invoking the powers granted under the audit statute (SG §§2-1217 to 2-1227), the agency that receives the request should treat it as a request subject to all of the procedures of the PIA, including the requirement of a written application. 76 *Opinions of the Attorney General* 287 (1991).

B. Time for Response

Under SG §10-614(b)(2), if a record is found to be responsive to a request and is recognized to be open to inspection, it must be produced "immediately" after receipt of the written request. An additional "reasonable period, not to exceed 30 days" is available only where the additional period of time is required to retrieve the records and assess their status under the PIA. A custodian should not wait the full 30 days to allow or deny access to a record if that amount of time is not needed to respond. If access is to be granted, the record should be produced for inspection and copying promptly after the written request is received. Similarly, when access to a record is denied, the custodian is to "immediately" notify the applicant. SG §10-614(b)(3)(i). Within ten working days after the denial, the custodian must provide the applicant with a written statement in accordance with SG §10-614(b)(3)(ii). In practice, the denial and explanation generally are provided as part of a single response.

There appears to be some conflict between the "immediate" access requirement of SG §10-614(b)(2) and the 30 days allowed to grant or deny a request by SG §10-614(b)(1). This conflict is resolved, however, if the custodian immediately grants access where the right to access is clear. If the custodian, after an initial review of the records, determines that there is a question about the applicant's right to inspect them, then a period of up to 30 days may be used to determine whether a denial is authorized and appropriate. If the problem is that the request is unclear or unreasonably broad, the custodian should ask the applicant to clarify or narrow the request promptly. The custodian should not wait the full 30 days and deny the request only because it is unclear or unreasonably broad.

The 30-day time periods in SG §10-614(b)(1) and (2) and the other time periods imposed by SG §10-614 may be extended, with the consent of the applicant, for an additional period not to exceed 30 days. SG §10-614(b)(4).

A troubling question is presented where the custodian, acting in good faith, is unable to comply with the time limits set by the PIA. For example, a custodian may have trouble retrieving old records and then, after retrieval, may find that portions of the records must be deleted to protect confidential material from disclosure. Even with due diligence, the custodian may be unable to comply with the request within the time limits set by the PIA. If an extension is not obtainable under SG §10-614(b)(4), the custodian should make the best good faith response possible by: (1) allowing inspection of any portion of the records that are currently available; and (2) informing the applicant, within the imposed time limit, of the reasons for the delay and an estimated date when the agency's review will be complete.

This course should be followed only when it is impracticable for the custodian to comply with the PIA's time limits. Every effort should be made to follow the PIA's time limits. Under FOIA, if an agency can show that exceptional circumstances exist and that it is exercising due diligence in responding to a request, courts have allowed the agency additional time. *See Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976) (court allowed FBI to handle large volume of requests for information by fulfilling requests on a first-in, first-out basis even though statutory time limits were exceeded). *See also Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976); *Hayden v. Department of Justice*, 413 F. Supp. 1285 (D.D.C. 1976). Other courts have resisted agency efforts to maintain a routine backlog of FOIA requests. *See Ray v. Department of Justice*, 770 F. Supp. 1544 (S.D. Fla. 1990) (routine administrative backlog of requests for records did not constitute "exceptional circumstances" allowing agency to respond outside FOIA's 10-day requirement). *Accord*, *Mayock v. INS*, 714 F. Supp. 1588 (N.D. Cal. 1989), *rev'd*, 938 F. 2d 1006 (9th Cir. 1990).

C. Records Not in Custodian's Custody or Control

If a written request for access to a record is made to a person who is not the custodian, that person must, within 10 working days of the receipt of the request, notify the applicant of this fact and, if known, the actual custodian of the record and the location or possible location of the record. SG §10-614(a)(2).

D. Written Denial

When a request is denied, the custodian must provide, within 10 working days, a written statement of the reasons for the denial, the legal authority for the denial, and notice of the remedies for review of the denial. SG §10-614(b)(3)(ii). A sample denial letter is contained in Appendix B. Although this letter reflects a record-by-record decision, an index of withheld documents is not required at the administrative denial stage, so long as the letter complies with SG §10-614(b)(3)(ii). Generally, a denial letter should be reviewed by the agency's legal counsel before it is sent out to ensure that the denial is correct as a matter of law and to ensure that the three elements in SG §10-614(b)(3)(ii) are adequately and correctly stated in the letter.

Before sending a denial letter and after consulting with counsel, a custodian may consider negotiating with the applicant or the applicant's attorney. The applicant may wish to withdraw or limit the part of the request that is giving the agency difficulty and thus avoid the need for a formal denial.

E. Administrative Review

An agency may establish a process under which an applicant may obtain administrative review of a denial. The PIA does not require such administrative review processes to be exhausted, however, before the applicant seeks judicial review under SG §10-623.

If an agency is subject to the "contested case" provisions of the Administrative Procedure Act, Title 10, Subtitle 2 of the State Government Article, the agency must provide the applicant with the opportunity for an administrative review in accordance with contested case hearing procedures. By the express terms of SG §10-622(c), however, the applicant does not have to exhaust this remedy before seeking judicial review under SG §10-623.

The PIA requires that any applicant who makes a request be given an APA hearing, despite the fact that it often makes little sense to have such a hearing. Adjudicatory hearings of this type are most appropriate for factual disputes, whereas the issue in a PIA denial is usually one of law (*e.g.* the scope of a statutory exception) that the agency should have fully considered prior to the denial. Nevertheless, the PIA is explicit, and denial letters from

agencies subject to APA contested case provisions should indicate this procedure as an available remedy for review.

F. Judicial Enforcement

The PIA provides for judicial enforcement of the rights provided under the Act. SG §10-623. It calls for a suit in the circuit court to "enjoin" an entity, official, or employee from withholding records and order the production of records improperly withheld. Literally, SG §10-623 refers only to persons denied "the right to inspect" a record. It does not explicitly refer to the right to obtain copies. Despite this oversight, it is likely that a court would construe SG §10-623 to provide for judicial scrutiny of an agency's refusal to provide copies.

1. Limitations

The Court of Special Appeals has held that actions for judicial review under SG §10-623 of the PIA are controlled by CJ §5-110, which has a two-year limitations period, rather than by former Rule B4, which would require the action to be brought within 30 days. The Court did not decide whether proceedings under SG §10-623 are subject to any other rules governing administrative appeals. *Kline v. Fuller*, 56 Md. App. 294, 467 A.2d 786 (1983).

2. Procedural Issues

- **Venue.** Venue is proper where the complainant resides or has a principal place of business or where the records are located. SG §10-623(a)(1). *See Attorney Grievance Commission v. A.S. Abell*, 294 Md. 680, 452 A.2d 656 (1982).

- **Answer.** The defendant must answer or otherwise plead within 30 days after service, unless the time period is expanded for good cause shown. SG §10-623(b).

- **Expedited hearing.** SG §10-623(c)(1) provides for expedited court proceedings in PIA cases. The agency and counsel should cooperate if the plaintiff seeks a quick judicial determination.

- **Intervention.** In some cases, it may be appropriate for a third party to intervene in an action for disclosure. For example, if the issue is the release of investigatory, financial, or similar records, the person who is the subject of the records may wish to intervene under Maryland Rule 2-214. In an appropriate case, particularly one involving confidential business records, the agency should consider inviting affected persons to intervene. An affected person's failure to seek intervention may itself be an indication that the records are not truly confidential.

3. Agency Burden

The burden is on the entity or official withholding a record to sustain its action. SG §10-623(b)(2)(i). If the custodian invokes the agency memoranda exception, however, and the trial court determines that one of the privileges embraced within that exemption applies, the custodian will have met the burden of showing that disclosure would be contrary to the public interest. *Cranford v. Montgomery County*, 300 Md. 759, 776, 481 A.2d 229 (1984). The PIA specifically provides that the defendant custodian may submit a memorandum to the court justifying the denial. SG §10-623(b)(2)(ii). *Cranford* discusses the level of detail necessary to support a denial of access.

To satisfy the statutory burden, an entity or official withholding a record must put forth evidence sufficient to justify the decision. In some circumstances, a court may require the agency to file a *Vaughn* index (named after the *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)) detailing each record withheld or redacted by author, date, and recipient, and providing enough information about the subject matter to permit the requester and court to test the justification of the withholding.

A regulatory agency that denies a person in interest access to an investigatory file under SG § 10-618(f)(1)(ii) must establish first, that the file was compiled for a law enforcement purpose and second, that disclosure would have a prejudicial effect under SG § 10-618(f)(2). *Fioretti v. State Board of Dental Examiners,* 351 Md. 66, 716 A. 2d 258 (1998) (holding in plaintiff's favor, because the agency failed to support its motion to dismiss with affidavits, a summary of the file, or other relevant evidence).

In contrast, a law enforcement agency enumerated under SG §10-618(f)(1)(i) is presumed to have compiled an investigatory file for law enforcement purposes. Because a generic determination of interference with a pending investigation can be made, a *"Vaughn* index" listing each document, its author, date, and general subject matter, and the basis for withholding the document, is not required. *See Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118, 737 A.2d 592 (1999).

The court may examine the questioned records *in camera* to determine whether an exception applies. SG §10-623(c)(2). *See Equitable Trust Co. v. State Comm'n on Human Relations*, 42 Md. App. 53, 399 A.2d 908 (1979), *rev'd on other grounds*, 287 Md. 80, 411 A.2d 86 (1980). SG §10-623(c)(2), allowing *in camera* inspection, is discretionary, not mandatory. Whether an *in camera* inspection will be made ultimately depends on whether the trial judge believes that it is needed to make a responsible determination on claims of exemption. *Cranford v. Montgomery County*, 300 Md. 759, 779, 481 A.2d 221, 231 (1984). *See also Zaal v. State*, 326 Md. 54, 602 A.2d 1247 (1992), where the Court discussed alternative approaches to protect sensitive records.

4. Remedies

In addition to injunctive relief, a court may award actual and punitive damages for a knowing and willful failure to disclose, if the defendant custodian knew, or should have known, that the person was entitled to inspect the record. SG §10-623(d)(1). The official custodian is also liable for actual and punitive damages for failure to petition a court for an order to continue a temporary denial. SG §10-623(d)(2).

Reasonable attorneys' fees and other litigation costs are available if an applicant "substantially prevails." SG §10-623(f). *See Attorney Grievance Commission v. A.S. Abell*, 294 Md. 680, 452 A.2d 656 (1982). This standard is very close to the standards of FOIA (5 U.S.C. §552(a)(4)(E)) and the Civil Rights Attorneys Fees Act (42 U.S.C. §1988), and the same liberal construction of "substantially prevailing" would probably apply under the Maryland Act. If the statute creating the agency specifically grants immunity from liability, however, that specific enactment will prevail over SG §10-623(f). *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 464 A.2d 1068 (1983).

If an applicant substantially prevails, the awarding of attorneys' fees lies with the discretion of the trial court. Among the pertinent considerations to be taken into account are the benefit the public derived from the suit, the nature of the applicant's interest in the released information, and whether the agency's withholding of the information had a reasonable basis in law. *Kirwan v. The Diamondback*, 352 Md. 74, 95-96, 721 A. 2d 196 (1998), *citing Kline v. Fuller*, 64 Md. App. 375, 386, 496 A. 2d 325 (1985).

Fees and costs are available under the PIA only to a prevailing "applicant." Compare this provision with the Open Meetings Act, §10-510(d)(5)(i) of the State Government Article, which makes any "party" eligible for fees and costs. *See* 36 A.L.R. Fed. 530 for a discussion of cases under 5 U.S.C. §552(a)(4)(E).

V

Liability of Persons Who Violate the Act

The PIA provides for both civil and criminal penalties for violations of the Act. Given this potential liability and the salutary purposes of the PIA, care should be taken to make certain that an agency's officials and employees comply with the Act.

A. Criminal Penalties

SG §10-627 provides for a $1000 fine for any person who willfully and knowingly violates the Act. 61 *Opinions of the Attorney General* 698 (1976); 65 *Opinions of the Attorney General* 365 (1980). This section applies to any person, not just to custodians or agency employees.

SG §10-627(a)(3) also provides that a person may not "by false pretenses, bribery, or theft, gain access to or obtain a copy of a personal record whose disclosure to the person is prohibited by ... this subtitle." This provision was added to the law to protect an individual's privacy. *See* Governor's Information Practices Commission, Final Report 549-50 (1982). These "personal records" are the individually identifiable public records defined in SG §10-624.

B. Disciplinary Action

When a court finds that the custodian acted "arbitrarily or capriciously" in withholding a public record, it is to refer the matter to the appointing authority of the custodian for appropriate disciplinary action. SG §10-623(e). The appointing authority must investigate the matter and take such disciplinary action as is warranted under the circumstances.

C. Unlawful Disclosure or Use of Personal Records

SG §10-626 authorizes an award of actual and punitive damages, attorneys fees and litigation costs against:

> A person, including an officer or employee of a governmental unit ... if:
>
> (1)(i) the person willfully and knowingly permits inspection or use of a public record in violation of this Part III of this subtitle; and
>
> (ii) the public record names or, with reasonable certainty, otherwise identifies the individual by an identifying factor such as:
>
> 1. an address;
> 2. a description;
> 3. a finger or voice print;
> 4. a number; or
> 5. a picture; or
>
> (2) the person willfully and knowingly obtains, discloses, or uses personal information in violation of §10-616(p) [MVA records] of this subtitle.

This provision applies only to (1) "personal records" defined by SG §10-624, and (2) "personal information" defined by SG §10-611(f) and relating to Motor Vehicle Administration records. Unlike the damage provision in SG §10-623(d)(1), which authorizes damages only against a governmental unit, this section authorizes damages against officers or employees of a governmental unit and other persons not connected with the agency who have willfully and knowingly violated the law. This provision is not itself a basis for

denying a PIA request. Rather, it is an additional sanction for failing to comply with PIA provisions that prohibit disclosure of certain "personal records" and to certain "personal information" in records of the Motor Vehicle Administration.

D. Disclosure of Certain Information to the Attorney General

A custodian is protected from civil and criminal penalties if the custodian transfers or discloses the content of any public record to the Attorney General as provided in §5-313 of the State Personnel and Pensions Article. This latter section, part of the "Whistleblower Law," authorizes State employees to disclose to the Attorney General information otherwise protected by the PIA. SG §10-628.

VI

Research Access

Under SG §10-624(c), the official custodian, in his or her discretion, may grant access to otherwise nondisclosable personal records for research purposes when certain safeguards are followed. The rationale for this provision was explained by the Governor's Information Practices Commission:

> An individual entrusting a government agency with sensitive, personally identifiable information has a right to expect that the agency will handle the information with the care and confidentiality it deserves. For example, the Commission asserts that the privacy interests of a record subject regarding personally identifiable medical information clearly is greater than the public's right to inspect that data.
>
> The Commission believes, however, that there may be certain situations in which a significant public purpose would be served by the examination of such data by researchers. Without question, society has benefitted immeasurably by the advances in medical research over the past decades. Yet many of these advances would not have been possible without access to personally identifiable data.
>
> ...

> The Commission feels that a mechanism should be established to permit access to personally identifiable information for meritorious research projects while, at the same time, protecting the privacy rights of the records subjects. The Commission believes that the best way to accomplish both goals is to require researchers to meet certain specified conditions prior to the release of personally identifiable data. First of all, a researcher should be required to provide a written statement to the custodian explaining the purpose of the research project, the nature of the records needed to achieve the project's goals, and the specific safeguards that will be taken to protect the identities of the records' subjects. The Commission also firmly believes that the researcher should agree that he will not contact the records subjects in any way without the prior approval and monitoring of the custodian. Third, the Commission feels that the data should not be released unless the custodian is convinced of the adequacy of the researcher's proposed safeguards to prevent the public identification of the records subjects. Finally, the researcher should be required to execute an agreement with the custodian delineating all of the above points and attesting to the fact that failure to abide by the conditions of the agreement would constitute a breach of contract.

Governor's Information Practices Commission, Final Report 545-46 (1982). The language of the amendment and the rationale supplied by the Commission indicate that researchers may use this method to gain access to personal records even where a law other than the Public Information Act bars disclosure. Thus, the amendment has general effect beyond the PIA.

VII

The Right to Correction or Amendment of Public Records

Under SG §10-625, a person in interest may request that a State agency correct or amend public records, including personnel files, that the person has a right to inspect and believes are inaccurate or incomplete. Local agencies are not covered by this section. Under

some circumstances, death certificates are subject to correction pursuant to SG §10-625. Chapter 547, Laws of Maryland 1992.*

A. Agency Responsibility

Within 30 days after receiving a written request for correction or amendment, the agency must inform the requestor either that the requested change has been made or give written notice of the agency's refusal and the reason for it. SG §10-625(c). Once informed of a refusal, the person may file with the agency a statement of the reasons for the requested change and for the disagreement with the agency's decision. The agency must then include this statement in any disclosure of the public records to a third party. SG §10-625(d). If the unit is an agency subject to the contested case procedures of the Administrative Procedure Act, the person may seek administrative and judicial review of the agency's decision to deny the requested change or of any failure by the unit to provide the statement to a third party. SG §10-625(e).

B. Enforcement

SG §10-625 provides for administrative and judicial review pursuant to the Administrative Procedure Act. The judicial review provisions of SG §10-623 are not triggered in this situation, because a denial of the "right to inspect" has not occurred. *See* Bill Review Letter to Governor Hughes from Attorney General Sachs re: House Bill 862 (April 21, 1983).

C. Regulations

The Office of the Attorney General has developed model regulations to implement SG §10-625. *See* Appendix D, Chapter 2. Regulations based on earlier revisions of this model have been adopted by several State agencies. *See, e.g.* COMAR 11.01.15 (regulations of the Department of Transportation) and COMAR 15.01.06 (regulations of the Department of Agriculture).

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* Chapter 547 reversed an opinion of this office concluding that the PIA records correction mechanism was not available for correction of death certificates. 76 *Opinions of the Attorney General* 276 (1991). The term "person in interest" is specially defined for purposes of correction of a death certificate. *See* SG §10-611(e)(3).

VIII

Restrictions on the Creation and Collection of Personal Records

Concerns about individual privacy prompted the amendment of the PIA during the 2000 session of the General Assembly to prohibit a unit of the State or of a local government from creating "personal records" absent a clearly established need. SG §10-624(b).* A "personal record" is defined as one that "name or, with reasonable certainty otherwise identifies an individual by an identifying factor such as" an address, description, fingerprint, voice print, number, or picture. SG §10-624(a).

Those amendments also mandate that State agencies collect personal information from the person in interest to the greatest extent practicable. SG §10-624(c)(2). The person in interest is to be informed of: (1) the purpose for which the personal information is collected; (2) the consequences of refusing to provide the information; (3) the right to inspect, amend, or correct personal records; (4) whether personal information is generally available for public inspection; and (5) whether the information is shared with any other entity. SG § 10-624(c)(3).

That legislation provided exemptions for certain personal records, including the collection of personal information related to the enforcement of criminal laws or the administration of the penal system, certain investigatory materials, records accepted by the State Archivist, information collected in conjunction with certain research projects, and personal records that the Secretary of Budget and Management exempts by regulation. SG §10-624(c)(5). In addition, these provisions may not be construed to preempt or conflict with provisions concerning medical records under the Health-General Article, Title 4, Subtitle 3, Annotated Code of Maryland. Chapter 4, §2, Laws of Maryland 2000. Finally, each unit of State government is required to post its privacy policies concerning collection of personal information on its internet web site. SG §10-624(c)(4).

SAMPLE REQUEST LETTER

Appendix A

*A provision outside of the PIA itself calls for agencies to keep only the information about a person that is needed to accomplish a governmental purpose. SG §10-602.

SAMPLE REQUEST LETTER

October 13, 2000

Mr. Freeman Information
Executive Director
License Commission
110 First Street
Baltimore, Maryland 21200

Dear Mr. Information:

This is a request under the Maryland Public Information Act, State Government Article §§10-611 to 628. I am making this request on behalf of my client, Wanda Know. In this capacity, I wish to inspect all records in your custody and control pertaining to the following:

(A) the denial by the Commission of the license or permit to Wanda Know which occurred on October 1, 2000; and

(B) any studies, statistics, reports, recommendations, or other records that treat in any fashion the Commission's actions, practices, or procedures concerning the granting or denial of licenses or permits during the last three fiscal years.

If all or any part of this request is denied, I request that I be provided with a written statement of the grounds for the denial. If you determine that some portions of the requested records are exempt from disclosure, please provide me with the portions that can be disclosed.

I also anticipate that I will want copies of some or all of the records sought. Therefore, please advise me as to the cost, if any, for obtaining a copy of the records and the total cost, if any, for all the records described above. If you have adopted a fee schedule for obtaining copies of records and other rules or regulations implementing the Act, please send me a copy.

I look forward to receiving disclosable records promptly and, in any event, to a decision about all of the requested records within 30 days. Thank you for your cooperation. If you have any questions regarding this request, please telephone me at the above number.

Sincerely,

Connie Have
Attorney-at-Law

cc: Evan Hand
Commission Attorney

WP>KMI:request

SAMPLE DENIAL LETTER

Appendix B

SAMPLE DENIAL LETTER

October 24, 2000

Connie Have, Esquire
1000 Lawyer Building
Baltimore, Maryland 21200

Dear Ms. Have:

I have received your letter dated October 13, 2000, submitted on behalf of your client, Wanda Know, in which you requested to inspect and copy all records in my custody and control pertaining to the following:

(A) the denial by the Commission of the license or permit to Wanda Know which occurred on October 1, 2000; and

(B) any studies, statistics, reports, recommendations, or other records that treat in any fashion the Commission's actions, practices, or procedures concerning the granting or denial of licenses or permits during the last three fiscal years.

My staff has collected these records and you may inspect all of the records we have collected with the exception of two records that I find to be not available for your inspection under the Annotated Code of Maryland, State Government Article, §§10-611) 10-628. In compliance with §10-614(b)(3)(ii), I will set forth a statement of the grounds for each denial of access with appropriate citation to the statutory section that permits me to deny access.

Record No. 1 (3 pages).

Memorandum dated September 1, 2000, from Evan Hand, Assistant Attorney General, to Joe Maybe, Commission Chairman. This memorandum constitutes advice of legal counsel and is protected from disclosure by §10-615(1) as a privileged or confidential record. It also constitutes an intra-agency memorandum under §10-618(b) and I find that disclosure to you would be contrary to the public

interest since disclosure could impair the attorney-client relationship necessary for the effective operation of this agency.

Record No. 2 (30 pages).

Record No. 2 constitutes a portion of investigatory File No. 96-1608 of this agency concerning your client. This file was compiled by this agency in pursuit of its law enforcement obligations under Article 112, §14. While your client is a person in interest as to these records, I find that complete disclosure of the file would be contrary to the public interest since inspection would disclose the identify of a confidential source and disclosure investigative techniques and procedures of the Commission. Section 10-618(f) allows me to deny you access to these file. See particularly §10-618(f)(2). You may inspect the balance of our investigatory file on your client, and it is part of the records we have collected for your inspection.

Pursuant to §10-614(b)(3)(ii)3, I must also inform you of all remedies available for review. Pursuant to §10-622, your client is entitled to an administrative review with this agency upon request. If requested, such review will be conducted in accordance with State Government Article §§10-205 through 221 and the hearing regulations of the agency published at COMAR 00.00.01. Your client may also pursue her judicial enforcement remedies under §10-623.

If you wish to inspect the records that are available to your client under the Act, please call my administrative assistant, Madge Public, who will arrange a mutually convenient time for your to inspect them. If you wish to obtain copies of any records, Ms. Public will assist you. You will be charged a fee of $.25 for each copy.

Sincerely,

Freeman Information
Executive Director

cc: Evan Hand
Assistant Attorney General

TEXT OF THE

PUBLIC INFORMATION ACT

Appendix C

Public Information Act
Annotated Code of Maryland
State Government Article

PUBLIC INFORMATION ACT
Annotated Code of Maryland
State Government Article
Title 10, Subtitle 6
Part III. Access to Public Records

10-611. Definitions.

(a) In this Part III of this subtitle the following words have the meanings indicated.

(b) "Applicant" means a person or governmental unit that asks to inspect a public record.

(c) "Custodian" means:

(1) the official custodian; or

(2) any other authorized individual who has physical custody and control of a public record.

(d) "Official custodian" means an officer or employee of the State or of a political subdivision who, whether or not the officer or employee has physical custody and control of a public record, is responsible for keeping the public record.

(e) "Person in interest" means:

(1) a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit;

(2) if the person has a legal disability, the parent or legal representative of the person; or

(3) as to requests for correction of certificates of death under § 5-310(d)(2) of the Health - General Article, the spouse, adult child, parent, adult sibling, grandparent, or guardian of the person of the deceased at the time of the deceased's death.

(f) (1) "Personal information" means information that identifies an individual including an individual's address, driver's license number or any other identification number,

medical or disability information, name, photograph or computer generated image, Social Security number, or telephone number.

(2) "Personal information" does not include an individual's driver's status, driving offenses, 5-digit zip code, or information on vehicular accidents.

(g) (1) "Public record" means the original or any copy of any documentary material that:

(i) is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business; and

(ii) is in any form, including:

1. a card;

2. a computerized record;

3. correspondence;

4. a drawing;

5. film or microfilm;

6. a form;

7. a map;

8. a photograph or photostat;

9. a recording; or

10. a tape.

(2) "Public record" includes a document that lists the salary of an employee of a unit or instrumentality of the State government or of a political subdivision.

(3) "Public record" does not include a digital photographic image or signature of an individual, or the actual stored data thereof, recorded by the Motor Vehicle Administration.

(h) (1) "Telephone solicitation" means the initiation of a telephone call to an individual or to the residence or business of an individual for the purpose of encouraging the purchase or rental of or investment in property, goods, or services.

(2) "Telephone solicitation" does not include a telephone call or message:

(i) to an individual who has given express permission to the person making the telephone call;

(ii) to an individual with whom the person has an established business relationship; or

(iii) by a tax-exempt, nonprofit organization.

10-612. General Right to Information.

(a) All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.

(b) To carry out the right set forth in subsection (a) of this section, unless an unwarranted invasion of the privacy of a person in interest would result, this Part III of this subtitle shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.

(c) This Part III of this subtitle does not preclude a member of the General Assembly from acquiring the names and addresses of and statistical information about individuals who are licensed or, as required by a law of the State, registered.

10-613. Inspection of Public Records.

(a) Except as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time.

(b) To protect public records and to prevent unnecessary interference with official business, each official custodian shall adopt reasonable rules or regulations that, subject to this Part III of this subtitle, govern timely production and inspection of a public record.

10-614. Applications.

(a) (1) A person or governmental unit that wishes to inspect a public record shall submit a written application to the custodian.

(2) If the individual to whom the application is submitted is not the custodian of the public record, within 10 working days after receiving the application, the individual shall give the applicant:

(i) notice of that fact; and

(ii) if known:

1. the name of the custodian; and

2. the location or possible location of the public record.

(b) (1) Within 30 days after receiving an application, the custodian shall grant or deny the application.

(2) A custodian who approves the application shall produce the public record immediately or within the reasonable period that is needed to retrieve the public record, but not to exceed 30 days after receipt of the application.

(3) A custodian who denies the application shall:

(i) immediately notify the applicant;

(ii) within 10 working days, give the applicant a written statement that gives:

1. the reasons for the denial;

2. the legal authority for the denial; and

3. notice of the remedies under this Part III of this subtitle for review of the denial; and

(iii) permit inspection of any part of the record that is subject to inspection and is reasonably severable.

(4) With the consent of the applicant, any time limit imposed under this subsection may be extended for not more than 30 days.

10-615. Required Denials - In General.

A custodian shall deny inspection of a public record or any part of a public record if:

(1) by law, the public record is privileged or confidential; or

(2) the inspection would be contrary to:

(i) a State statute;

(ii) a federal statute or a regulation that is issued under the statute and has the force of law;

(iii) the rules adopted by the Court of Appeals; or

(iv) an order of a court of record.

10-616. Required Denials - Specific Records.

(a) Unless otherwise provided by law, a custodian shall deny inspection of a public record, as provided in this section.

(b) A custodian shall deny inspection of public records that relate to the adoption of an individual.

(c) A custodian shall deny inspection of public records that relate to welfare for an individual.

(d) A custodian shall deny inspection of a letter of reference.

(e) (1) Subject to the provisions of paragraph (2) of this subsection, a custodian shall prohibit inspection, use, or disclosure of a circulation record of a public library or other item, collection, or grouping of information about an individual that:

(i) is maintained by a library;

(ii) contains an individual's name or the identifying number, symbol, or other identifying particular assigned to the individual; and

(iii) identifies the use a patron makes of that library's materials, services, or facilities.

(2) A custodian shall permit inspection, use, or disclosure of a circulation record of a public library only in connection with the library's ordinary business and only for the purposes for which the record was created.

(f) A custodian shall deny inspection of library, archival, or museum material given by a person to the extent that the person who made the gift limits disclosure as a condition of the gift.

(g) (1) Subject to paragraphs (2) through (7) of this subsection, a custodian shall deny inspection of a retirement record for an individual.

(2) A custodian shall permit inspection:

(i) by the person in interest;

(ii) by the appointing authority of the individual;

(iii) after the death of the individual, by a beneficiary, personal representative, or other person who satisfies the administrators of the retirement and pension systems that the person has a valid claim to the benefits of the individual; and

(iv) by any law enforcement agency in order to obtain the home address of a retired employee of the agency when contact with a retired employee is documented to be necessary for official agency business.

(3) A custodian shall permit inspection by the employees of a county unit that, by county law, is required to audit the retirement records for current or former employees of the county. However, the information obtained during the inspection is confidential, and the county unit and its employees may not disclose any information that would identify a person in interest.

(4) On request, a custodian shall state whether the individual receives a retirement or pension allowance.

(5) A custodian shall permit release of information as provided in § 21-504 or § 21-505 of the State Personnel and Pensions Article.

(6) On written request, a custodian shall:

(i) disclose the amount of that part of a retirement allowance that is derived from employer contributions and that is granted to:

1. a retired elected or appointed official of the State;

2. a retired elected official of a political subdivision; or

3. a retired appointed official of a political subdivision who is a member of a separate system for elected or appointed officials; or

(ii) disclose the benefit formula and the variables for calculating the retirement allowance of:

1. a current elected or appointed official of the State;

2. a current elected official of a political subdivision; or

3. a current appointed official of a political subdivision who is a member of a separate system for elected or appointed officials.

(7) (i) This paragraph applies to Anne Arundel County.

(ii) On written request, a custodian of retirement records shall disclose:

1. the total amount of that part of a pension or retirement allowance that is derived from employer contributions and that is granted to a retired elected or appointed official of the county;

2. the total amount of that part of a pension or retirement allowance that is derived from employee contributions and that is granted to a retired elected or appointed official of the county, if the retired elected or appointed official consents to the disclosure;

3. the benefit formula and the variables for calculating the retirement allowance of a current elected or appointed official of the county; or

4. the amount of the employee contributions plus interest attributable to a current elected or appointed official of the county, if the current elected or appointed official consents to the disclosure.

(iii) A custodian of retirement records shall maintain a list of those elected or appointed officials of the county who have consented to the disclosure of information under subparagraph (ii) 2 or 4 of this paragraph.

(h) (1) This subsection applies only to public records that relate to:

(i) police reports of traffic accidents;

(ii) criminal charging documents prior to service on the defendant named in the document; and

(iii) traffic citations filed in the Maryland Automated Traffic System.

(2) A custodian shall deny inspection of a record described in paragraph (1) of this subsection to any of the following persons who request inspection of records for the purpose of soliciting or marketing legal services:

(i) an attorney who is not an attorney of record of a person named in the record; or

(ii) a person who is employed by, retained by, associated with, or acting on behalf of an attorney described in this paragraph.

(i) (1) Subject to paragraph (2) of this subsection, a custodian shall deny inspection of a personnel record of an individual, including an application, performance rating, or scholastic achievement information.

(2) A custodian shall permit inspection by:

(i) the person in interest; or

(ii) an elected or appointed official who supervises the work of the individual.

(j) A custodian shall deny inspection of a hospital record that:

(1) relates to:

(i) medical administration;

(ii) staff;

(iii) medical care; or

(iv) other medical information; and

(2) contains general or specific information about 1 or more individuals.

(k) (1) Subject to paragraphs (2) and (3) of this subsection, a custodian shall deny inspection of a school district record about the home address, home phone number, biography, family, physiology, religion, academic achievement, or physical or mental ability of a student.

(2) A custodian shall permit inspection by:

(i) the person in interest; or

(ii) an elected or appointed official who supervises the student.

(3) A custodian may permit inspection of the home address or home phone number of a student of a public school by:

(i) an organization of parents, teachers, students, or former students, or any combination of those groups, of the school;

(ii) an organization or force of the military;

(iii) a person engaged by a school or board of education to confirm a home address or home phone number; or

(iv) a representative of a community college in the State.

(l) Subject to the provisions of § 4-310 of the Insurance Article, a custodian shall deny inspection of all RBC reports and RBC plans and any other records that relate to those reports or plans.

(m) (1) Subject to the provisions of paragraph (2) of this subsection, a custodian shall deny inspection of all photographs, videotapes or electronically recorded images of vehicles, vehicle movement records, personal financial information, credit reports, or other personal or financial data created, recorded, obtained by or submitted to the Maryland Transportation Authority or its agents or employees in connection with any electronic toll collection system.

(2) A custodian shall permit inspection of the records enumerated in paragraph (1) of this subsection by:

(i) an individual named in the record;

(ii) the attorney of record of an individual named in the record; or

(iii) employees or agents of the Maryland Transportation Authority in any investigation or proceeding relating to the imposition of or indemnification from liability for failure to pay a toll in connection with any electronic toll collection system.

(n) (1) Subject to paragraph (2) of this subsection, a custodian shall deny inspection of any record disclosing the name of a purchaser or qualified beneficiary of a higher education investment contract under Title 18, Subtitle 19 of the Education Article.

(2) A custodian:

(i) shall permit inspection by a person in interest; and

(ii) may release information to an eligible institution designated in a higher education investment contract in accordance with regulations of the Maryland Higher Education Investment Program Board.

(o) (1) In this subsection, "recorded images" has the meaning stated in § 21-202.1 of the Transportation Article.

(2) Except as provided in paragraph (3) of this subsection, a custodian of recorded images produced by a traffic control signal monitoring system operated under § 21-202.1 of the Transportation Article shall deny inspection of the recorded images.

(3) A custodian shall allow inspection of recorded images:

(i) as required in § 21-202.1 of the Transportation Article;

(ii) by any person issued a citation under § 21-202.1 of the Transportation Article, or an attorney of record for the person; or

(iii) by an employee or agent of a law enforcement agency in an investigation or proceeding relating to the imposition of or indemnification from civil liability pursuant to § 21-202.1 of the Transportation Article.

(p) (1) Except as provided in paragraphs (2) through (5) of this subsection, a custodian may not knowingly disclose a public record of the Motor Vehicle Administration containing personal information.

(2) A custodian shall disclose personal information when required by federal law.

(3) (i) This paragraph applies only to the disclosure of personal information for any use in response to a request for an individual motor vehicle record.

(ii) The custodian may not disclose personal information without written consent from the person in interest.

(iii) 1. At any time the person in interest may withdraw consent to disclose personal information by notifying the custodian.

2. The withdrawal by the person in interest of consent to disclose personal information shall take effect as soon as practicable after it is received by the custodian.

(4) (i) This paragraph applies only to the disclosure of personal information for inclusion in lists of information to be used for surveys, marketing, and solicitations.

(ii) The custodian may not disclose personal information for surveys, marketing, and solicitations without written consent from the person in interest.

(iii) 1. At any time the person in interest may withdraw consent to disclose personal information by notifying the custodian.

2. The withdrawal by the person in interest of consent to disclose personal information shall take effect as soon as practicable after it is received by the custodian.

(iv) The custodian may not disclose personal information under this paragraph for use in telephone solicitations.

(v) Personal information disclosed under this paragraph may be used only for surveys, marketing, or solicitations and only for a purpose approved by the Motor Vehicle Administration.

(5) Notwithstanding the provisions of paragraphs (3) and (4) of this subsection, a custodian shall disclose personal information:

(i) for use by a federal, state, or local government, including a law enforcement agency, or a court in carrying out its functions;

(ii) for use in connection with matters of:

1. motor vehicle or driver safety;

2. motor vehicle theft;

3. motor vehicle emissions;

4. motor vehicle product alterations, recalls, or advisories;

5. performance monitoring of motor vehicle parts and dealers; and

6. removal of nonowner records from the original records of motor vehicle manufacturers;

(iii) for use by a private detective agency licensed by the Secretary of State Police under Title 13 of the Business Occupations and Professions Article or a security guard service licensed by the Secretary of State Police under Title 19 of the Business Occupations and Professions Article for a purpose permitted under this paragraph;

(iv) for use in connection with a civil, administrative, arbitral, or criminal proceeding in a federal, state, or local court or regulatory agency for service of process, investigation in anticipation of litigation, and execution or enforcement of judgments or orders;

(v) for purposes of research or statistical reporting as approved by the Motor Vehicle Administration provided that the personal information is not published, redisclosed, or used to contact the individual;

(vi) for use by an insurer, insurance support organization, or self-insured entity, or its employees, agents, or contractors, in connection with rating, underwriting, claims investigating, and antifraud activities;

(vii) for use in the normal course of business activity by a legitimate business entity, its agents, employees, or contractors, but only:

1. to verify the accuracy of personal information submitted by the individual to that entity; and

2. if the information submitted is not accurate, to obtain correct information only for the purpose of:

A. preventing fraud by the individual;

B. pursuing legal remedies against the individual; or

C. recovering on a debt or security interest against the individual;

(viii) for use by an employer or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C.A. § 2701 et seq.);

(ix) for use in connection with the operation of a private toll transportation facility;

(x) for use in providing notice to the owner of a towed or impounded motor vehicle;

(xi) for use by an applicant who provides written consent from the individual to whom the information pertains if the consent is obtained within the 6-month period before the date of the request for personal information;

(xii) for use in any matter relating to:

1. the operation of a Class B (for hire), Class C (funeral and ambulance), or Class Q (limousine) vehicle; and

2. public safety or the treatment by the operator of a member of the public; and

(xiii) for a use specifically authorized by the law of this State, if the use is related to the operation of a motor vehicle or public safety.

(6) (i) A person receiving personal information under paragraph (4) or (5) of this subsection may not use or redisclose the personal information for a purpose other than the purpose for which the custodian disclosed the personal information.

(ii) A person receiving personal information under paragraph (4) or (5) of this subsection who rediscloses the personal information shall:

1. keep a record for 5 years of the person to whom the information is redisclosed and the purpose for which the information is to be used; and

2. make the record available to the custodian on request.

(7) (i) The custodian shall adopt regulations to implement and enforce the provisions of this subsection.

(ii) 1. The custodian shall adopt regulations and procedures for securing a person in interest's waiver of privacy rights under this subsection when an applicant requests personal information about the person in interest that the custodian is not authorized to disclose under paragraphs (2) through (5) of this subsection.

2. The regulations and procedures adopted under this subparagraph shall:

A. state the circumstances under which the custodian may request a waiver; and

B. conform with the waiver requirements in the federal Driver's Privacy Protection Act of 1994 and other federal law.

(8) The custodian may develop and implement methods for monitoring compliance with this section and ensuring that personal information is used only for purposes for which it is disclosed.

(q) (1) Except as provided in paragraph (4) of this subsection and subject to the provisions of paragraph (5) of this subsection, unless otherwise ordered by the court, files and records of the court pertaining to an arrest warrant issued pursuant to Maryland Rule 4-212(d)(1) or (2) and the charging document upon which the arrest warrant was issued may not be open to inspection until either:

(i) the arrest warrant has been served and a return of service has been filed in compliance with Maryland Rule 4-212(g); or

(ii) 90 days have elapsed since the arrest warrant was issued.

(2) Except as provided in paragraph (4) of this subsection and subject to the provisions of paragraph (5) of this subsection, unless otherwise ordered by the court, files and records of the court pertaining to an arrest warrant issued pursuant to a grand jury indictment or conspiracy investigation and the charging document upon which the arrest warrant was issued may not be open to inspection until all arrest warrants for any co-conspirators have been served and all returns of service have been filed in compliance with Maryland Rule 4-212(g).

(3) Subject to the provisions of paragraphs (1) and (2) of this subsection, unless sealed pursuant to Maryland Rule 4-201(d), the files and records shall be open to inspection.

(4) (i) Subject to subparagraph (ii) of this paragraph, the name, address, birth date, driver's license number, sex, height, and weight of an individual contained in an arrest warrant issued pursuant to Maryland Rule 4-212(d)(1) or (2) or issued pursuant to a grand jury indictment or conspiracy investigation may be released to the Motor Vehicle Administration for use by the Administration for purposes of § 13-406.1 or § 16-204 of the Transportation Article.

(ii) Except as provided in subparagraph (i) of this paragraph, information contained in a charging document that identifies an individual may not be released to the Motor Vehicle Administration.

(5) The provisions of paragraphs (1) and (2) of this subsection may not be construed to prohibit:

(i) the release of statistical information concerning unserved arrest warrants;

(ii) the release of information by a State's Attorney or peace officer concerning an unserved arrest warrant and the charging document upon which the arrest warrant was issued; or

(iii) inspection of files and records, of a court pertaining to an unserved arrest warrant and the charging document upon which the arrest warrant was issued, by:

1. a judicial officer;

2. any authorized court personnel;

3. a State's Attorney;

4. a peace officer;

5. a correctional officer who is authorized by law to serve an arrest warrant;

6. a bail bondsman, surety insurer, or surety who executes bail bonds who executed a bail bond for the individual who is subject to arrest under the arrest warrant;

7. an attorney authorized by the individual who is subject to arrest under the arrest warrant;

8. the Department of Public Safety and Correctional Services or the Department of Juvenile Justice for the purpose of notification of a victim under the provisions of Article 27, § 788 of the Code; or

9. a federal, State, or local criminal justice agency described under Article 27, Subtitle V (Criminal Justice Information System) of the Code.

10-617. Required Denials - Specific Information.

(a) Unless otherwise provided by law, a custodian shall deny inspection of a part of a public record, as provided in this section.

(b) (1) Subject to paragraph (2) of this subsection, a custodian shall deny inspection of the part of a public record that contains medical or psychological information about an individual, other than an autopsy report of a medical examiner.

(2) A custodian shall permit the person in interest to inspect the public record to the extent permitted under § 4-304(a) of the Health-General Article.

(c) If the official custodian has adopted rules or regulations that define sociological information for purposes of this subsection, a custodian shall deny inspection of the part of a public record that contains sociological information, in accordance with the rules or regulations.

(d) A custodian shall deny inspection of the part of a public record that contains any of the following information provided by or obtained from any person or governmental unit:

(1) a trade secret;

(2) confidential commercial information;

(3) confidential financial information; or

(4) confidential geological or geophysical information.

(e) Subject to § 21-504 of the State Personnel and Pensions Article, a custodian shall deny inspection of the part of a public record that contains the home address or telephone number of an employee of a unit or instrumentality of the State or of a political subdivision unless:

(1) the employee gives permission for the inspection; or

(2) the unit or instrumentality that employs the individual determines that inspection is needed to protect the public interest.

(f) (1) This subsection does not apply to the salary of a public employee.

(2) Subject to paragraph (3) of this subsection, a custodian shall deny inspection of the part of a public record that contains information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

(3) A custodian shall permit inspection by the person in interest.

(g) A custodian shall deny inspection of the part of a public record that contains information about the security of an information system.

(h) (1) Subject to paragraphs (2) through (4) of this subsection, a custodian shall deny inspection of the part of a public record that contains information about the licensing of an individual in an occupation or profession.

(2) A custodian shall permit inspection of the part of a public record that gives:

(i) the name of the licensee;

(ii) the business address of the licensee or, if the business address is not available, the home address;

(iii) the business telephone number of the licensee;

(iv) the educational and occupational background of the licensee;

(v) the professional qualifications of the licensee;

(vi) any orders and findings that result from formal disciplinary actions; and

(vii) any evidence that has been provided to the custodian to meet the requirements of a statute as to financial responsibility.

(3) A custodian may permit inspection of other information about a licensee if:

(i) the custodian finds a compelling public purpose; and

(ii) the rules or regulations of the official custodian permit the inspection.

(4) Except as otherwise provided by this subsection or other law, a custodian shall permit inspection by the person in interest.

(5) A custodian who sells lists of licensees shall omit from the lists the name of any licensee, on written request of the licensee.

(i) A custodian shall deny inspection of the part of a public record that contains information, generated by the bid analysis management system, concerning an investigation based on a transportation contractor's suspected collusive or anticompetitive activity submitted to the Department by:

(1) the United States Department of Transportation; or

(2) another state.

(j) (1) Subject to paragraphs (2) through (5) of this subsection, a custodian shall deny inspection of the part of a public record that contains information about the application and commission of a person as a notary public.

(2) A custodian shall permit inspection of the part of a public record that gives:

(i) the name of the notary public;

(ii) the home address of the notary public;

(iii) the home and business telephone numbers of the notary public;

(iv) the issue and expiration dates of the notary public's commission;

(v) the date the person took the oath of office as a notary public; or

(vi) the signature of the notary public.

(3) A custodian may permit inspection of other information about a notary public if the custodian finds a compelling public purpose.

(4) A custodian may deny inspection of a record by a notary public or any other person in interest only to the extent that the inspection could:

(i) interfere with a valid and proper law enforcement proceeding;

(ii) deprive another person of a right to a fair trial or an impartial adjudication;

(iii) constitute an unwarranted invasion of personal privacy;

(iv) disclose the identity of a confidential source;

(v) disclose an investigative technique or procedure;

(vi) prejudice an investigation; or

(vii) endanger the life or physical safety of an individual.

(5) A custodian who sells lists of notaries public shall omit from the lists the name of any notary public, on written request of the notary public.

10-618. Permissible Denials.

(a) Unless otherwise provided by law, if a custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest, the custodian may deny inspection by the applicant of that part, as provided in this section.

(b) A custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit.

(c) (1) Subject to paragraph (2) of this subsection, a custodian may deny inspection of test questions, scoring keys, and other examination information that relates to the administration of licenses, employment, or academic matters.

(2) After a written promotional examination has been given and graded, a custodian shall permit a person in interest to inspect the examination and the results of the examination, but may not permit the person in interest to copy or otherwise to reproduce the examination.

(d) (1) Subject to paragraph (2) of this subsection, a custodian may deny inspection of a public record that contains the specific details of a research project that an institution of the State or of a political subdivision is conducting.

(2) A custodian may not deny inspection of the part of a public record that gives only the name, title, expenditures, and date when the final project summary will be available.

(e) (1) Subject to paragraph (2) of this subsection or other law, until the State or a political subdivision acquires title to property, a custodian may deny inspection of a public record that contains a real estate appraisal of the property.

(2) A custodian may not deny inspection to the owner of the property.

(f) (1) Subject to paragraph (2) of this subsection, a custodian may deny inspection of:

(i) records of investigations conducted by the Attorney General, a State's Attorney, a city or county attorney, a police department, or a sheriff;

(ii) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or

(iii) records that contain intelligence information or security procedures of the Attorney General, a State's Attorney, a city or county attorney, a police department, a State or local correctional facility, or a sheriff.

(2) A custodian may deny inspection by a person in interest only to the extent that the inspection would:

(i) interfere with a valid and proper law enforcement proceeding;

(ii) deprive another person of a right to a fair trial or an impartial adjudication;

(iii) constitute an unwarranted invasion of personal privacy;

(iv) disclose the identity of a confidential source;

(v) disclose an investigative technique or procedure;

(vi) prejudice an investigation; or

(vii) endanger the life or physical safety of an individual.

(g) (1) A custodian may deny inspection of a public record that contains information concerning the site-specific location of an endangered or threatened species of plant or animal, a species of plant or animal in need of conservation, a cave, or a historic property as defined in Article 83B, § 5-601(k) of the Code.

(2) A custodian may not deny inspection of a public record described in paragraph (1) of this subsection if requested by:

(i) the owner of the land upon which the resource is located; or

(ii) any entity that could take the land through the right of eminent domain.

(h) (1) Subject to paragraph (2) of this subsection, a custodian may deny inspection of that part of a public record that contains information disclosing or relating to an invention owned in whole or in part by a State public institution of higher education for 4 years to

permit the institution to evaluate whether to patent or market the invention and pursue economic development and licensing opportunities related to the invention.

(2) A custodian may not deny inspection of a part of a public record described in paragraph (1) of this subsection if:

(i) the information disclosing or relating to an invention has been published or disseminated by the inventors in the course of their academic activities or disclosed in a published patent;

(ii) the invention referred to in that part of the record has been licensed by the institution for at least 4 years; or

(iii) 4 years have elapsed from the date of the written disclosure of the invention to the institution.

(i) A custodian may deny inspection of that part of a public record that contains information disclosing or relating to a trade secret, confidential commercial information, or confidential financial information owned in whole or in part by the Maryland Technology Development Corporation.

10-619. Temporary Denials.

(a) Whenever this Part III of this subtitle authorizes inspection of a public record but the official custodian believes that inspection would cause substantial injury to the public interest, the official custodian may deny inspection temporarily.

(b) (1) Within 10 working days after the denial, the official custodian shall petition a court to order permitting the continued denial of inspection.

(2) The petition shall be filed with the circuit court for the county where:

(i) the public record is located; or

(ii) the principal place of business of the official custodian is located.

(3) The petition shall be served on the applicant, as provided in the Maryland Rules.

(c) The applicant is entitled to appear and to be heard on the petition.

(d) If, after the hearing, the court finds that inspection of the public record would cause substantial injury to the public interest, the court may pass an appropriate order permitting the continued denial of inspection.

10-620. Copies.

(a) (1) Except as otherwise provided in this subsection, an applicant who is authorized to inspect a public record may have:

(i) a copy, printout, or photograph of the public record; or

(ii) if the custodian does not have facilities to reproduce the public record, access to the public record to make the copy, printout, or photograph.

(2) An applicant may not have a copy of a judgment until:

(i) the time for appeal expires; or

(ii) if an appeal is noted, the appeal is dismissed or adjudicated.

(b) (1) The copy, printout, or photograph shall be made:

(i) while the public record is in the custody of the custodian; and

(ii) whenever practicable, where the public record is kept.

(2) The official custodian may set a reasonable time schedule to make copies, printouts, or photographs.

10-621. Fees.

(a) Subject to the limitations in this section, the official custodian may charge an applicant a reasonable fee for the search for, preparation of, and reproduction of a public record.

(b) The official custodian may not charge a fee for the first 2 hours that are needed to search for a public record and prepare it for inspection.

(c) (1) If another law sets a fee for a copy, printout, or photograph of a public record, that law applies.

(2) The official custodian otherwise may charge any reasonable fee for making or supervising the making of a copy, printout, or photograph of a public record.

(3) The official custodian may charge for the cost of providing facilities for the reproduction of the public record if the custodian did not have the facilities.

(d) The official custodian may waive a fee under this section if:

(1) the applicant asks for a waiver; and

(2) after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest.

10-622. Administrative Review.

(a) This section does not apply when the official custodian temporarily denies inspection under § 10-619 of this subtitle.

(b) If a unit is subject to Subtitle 2 of this title, a person or governmental unit may seek administrative review in accordance with that subtitle of a decision of the unit, under this Part III of this subtitle, to deny inspection of any part of a public record.

(c) A person or governmental unit need not exhaust the remedy under this section before filing suit.

10-623. Judicial Review.

(a) Whenever a person or governmental unit is denied inspection of a public record, the person or governmental unit may file a complaint with the circuit court for the county where:

(1) the complainant resides or has a principal place of business; or

(2) the public record is located.

(b) (1) Unless, for good cause shown, the court otherwise directs and notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to the complaint within 30 days after service of the complaint.

(2) The defendant:

(i) has the burden of sustaining a decision to deny inspection of a public record; and

(ii) in support of the decision, may submit a memorandum to the court.

(c) (1) Except for cases that the court considers of greater importance, a proceeding under this section, including an appeal, shall:

(i) take precedence on the docket;

(ii) be heard at the earliest practicable date; and

(iii) be expedited in every way.

(2) The court may examine the public record in camera to determine whether any part of it may be withheld under this Part III of this subtitle.

(3) The court may:

(i) enjoin the State, a political subdivision, or a unit, official, or employee of the State or of a political subdivision from withholding the public record;

(ii) pass an order for the production of the public record that was withheld from the complainant; and

(iii) for noncompliance with the order, punish the responsible employee for contempt.

(d) (1) A defendant governmental unit is liable to the complainant for actual damages and any punitive damages that the court considers appropriate if the court finds that any defendant knowingly and willfully failed to disclose or fully to disclose a public record that the complainant was entitled to inspect under this Part III of this subtitle.

(2) An official custodian is liable for actual damages and any punitive damages that the court considers appropriate if the court finds that, after temporarily denying inspection of a public record, the official custodian failed to petition a court for an order to continue the denial.

(e) (1) Whenever the court orders the production of a public record that was withheld from the applicant and, in addition, finds that the custodian acted arbitrarily or capriciously in withholding the public record, the court shall send a certified copy of its finding to the appointing authority of the custodian.

(2) On receipt of the statement of the court and after an appropriate investigation, the appointing authority shall take the disciplinary action that the circumstances warrant.

(f) If the court determines that the complainant has substantially prevailed, the court may assess against a defendant governmental unit reasonable counsel fees and other litigation costs that the complainant reasonably incurred.

10-624. Personal Records.

(a) In this section, "personal record" means a public record that names or, with reasonable certainty, otherwise identifies an individual by an identifying factor such as:

(1) an address;

(2) a description;

(3) a finger or voice print;

(4) a number; or

(5) a picture.

(b) (1) Personal records may not be created unless the need for the information has been clearly established by the unit collecting the records.

(2) Personal information collected for personal records:

(i) shall be appropriate and relevant to the purposes for which it is collected;

(ii) shall be accurate and current to the greatest extent practicable; and

(iii) may not be obtained by fraudulent means.

(c) (1) This subsection only applies to units of State government.

(2) Except as otherwise provided by law, an official custodian who keeps personal records shall, to the greatest extent practicable, collect personal information from the person in interest.

(3) An official custodian who requests personal information for personal records shall provide the following information to each person in interest from whom personal information is collected:

(i) the purpose for which the personal information is collected;

(ii) any specific consequences to the person for refusal to provide the personal information;

(iii) the person's right to inspect, amend, or correct personal records, if any;

(iv) whether the personal information is generally available for public inspection; and

(v) whether the personal information is made available or transferred to or shared with any entity other than the official custodian.

(4) Each unit of State government shall post its privacy policies with regard to the collection of personal information, including the policies specified in this subsection, on its Internet web site.

(5) The following personal records shall be exempt from the requirements of this subsection:

(i) information pertaining to the enforcement of criminal laws or the administration of the penal system;

(ii) information contained in investigative materials kept for the purpose of investigating a specific violation of State law and maintained by a State agency whose principal function may be other than law enforcement;

(iii) information contained in public records which are accepted by the State Archivist for deposit in the Maryland Hall of Records;

(iv) information gathered as part of formal research projects previously reviewed and approved by federally mandated institutional review boards; and

(v) any other personal records exempted by regulations adopted by the Secretary of Budget and Management, based on the recommendation of the Chief of Information Technology.

(6) In accordance with § 2-1246 of this article, the Secretary of Budget and Management shall report on October 1 of each year to the General Assembly on the personal records exempted by regulations under paragraph (5)(v) of this subsection.

(d) (1) This subsection does not apply to:

(i) a unit in the Legislative Branch of the State government;

(ii) a unit in the Judicial Branch of the State government; or

(iii) a board of license commissioners.

(2) If a unit or instrumentality of the State government keeps personal records, the unit or instrumentality shall submit an annual report to the Secretary of General Services, as provided in this subsection.

(3) An annual report shall state:

(i) the name of the unit or instrumentality;

(ii) for each set of the personal records:

1. the name;

2. the location; and

3. if a subunit keeps the set, the name of the subunit;

(iii) for each set of personal records that has not been previously reported:

1. the category of individuals to whom the set applies;

2. a brief description of the types of information that the set contains;

3. the major uses and purposes of the information;

4. by category, the source of information for the set; and

5. the policies and procedures of the unit or instrumentality as to access and challenges to the personal record by the person in interest and storage, retrieval, retention, disposal, and security, including controls on access; and

(iv) for each set of personal records that has been disposed of or changed significantly since the unit or instrumentality last submitted a report, the information required under item (iii) of this paragraph.

(4) A unit or instrumentality that has 2 or more sets of personal records may combine the personal records in the report only if the character of the personal records is highly similar.

(5) The Secretary of General Services shall adopt regulations that govern the form and method of reporting under this subsection.

(6) The annual report shall be available for public inspection.

(e) The official custodian may permit inspection of personal records for which inspection otherwise is not authorized by a person who is engaged in a research project if:

(1) the researcher submits to the official custodian a written request that:

(i) describes the purpose of the research project;

(ii) describes the intent, if any, to publish the findings;

(iii) describes the nature of the requested personal records;

(iv) describes the safeguards that the researcher would take to protect the identity of the persons in interest; and

(v) states that persons in interest will not be contacted unless the official custodian approves and monitors the contact;

(2) the official custodian is satisfied that the proposed safeguards will prevent the disclosure of the identity of persons in interest; and

(3) the researcher makes an agreement with the unit or instrumentality that:

(i) defines the scope of the research project;

(ii) sets out the safeguards for protecting the identity of the persons in interest; and

(iii) states that a breach of any condition of the agreement is a breach of contract.

10-625. Corrections of Public Record.

(a) A person in interest may request a unit of the State government to correct inaccurate or incomplete information in a public record that:

(1) the unit keeps; and

(2) the person in interest is authorized to inspect.

(b) A request under this section shall:

(1) be in writing;

(2) describe the requested change precisely; and

(3) state the reasons for the change.

(c) (1) Within 30 days after receiving a request under this section, a unit shall:

(i) make or refuse to make the requested change; and

(ii) give the person in interest written notice of the action taken.

(2) A notice of refusal shall contain the unit's reasons for the refusal.

(d) (1) If the unit finally refuses a request under this section, the person in interest may submit to the unit a concise statement that, in 5 pages or less, states the reasons for the request and for disagreement with the refusal.

(2) Whenever the unit provides the disputed information to a third party, the unit shall provide to that party a copy of the statement submitted to the unit by the person in interest.

(e) If a unit is subject to Subtitle 2 of this title, a person or governmental unit may seek administrative and judicial review in accordance with that subtitle of:

(1) a decision of the unit to deny:

(i) a request to change a public record; or

(ii) a right to submit a statement of disagreement; or

(2) the failure of the unit to provide the statement to a third party.

10-626. Unlawful Disclosure of Personal Records.

(a) A person, including an officer or employee of a governmental unit, is liable to an individual for actual damages and any punitive damages that the court considers appropriate if:

(1) (i) the person willfully and knowingly permits inspection or use of a public record in violation of this Part III of this subtitle; and

(ii) the public record names or, with reasonable certainty, otherwise identifies the individual by an identifying factor such as:

1. an address;

2. a description;

3. a finger or voice print;

4. a number; or

5. a picture; or

(2) the person willfully and knowingly obtains, discloses, or uses personal information in violation of § 10-616(p) of this subtitle.

(b) If the court determines that the complainant has substantially prevailed, the court may assess against a defendant reasonable counsel fees and other litigation costs that the complainant reasonably incurred.

10-627. Prohibited Acts; Criminal Penalties.

(a) A person may not:

(1) willfully or knowingly violate any provision of this Part III of this subtitle;

(2) fail to petition a court after temporarily denying inspection of a public record; or

(3) by false pretenses, bribery, or theft, gain access to or obtain a copy of a personal record whose disclosure to the person is prohibited by this Part III of this subtitle.

(b) A person who violates any provision of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000.

10-628. Immunity for Certain Disclosures.

A custodian is not civilly or criminally liable for transferring or disclosing the contents of a public record to the Attorney General under § 5-313 of the State Personnel and Pensions Article.

MODEL RULES ON

PUBLIC INFORMATION ACT

Appendix D

TITLE ___

DEPARTMENT OF _____

SUBTITLE __ GENERAL REGULATIONS

Chapter 01 Public Information Act Requests

Authority: [Department's authority to adopt regulations];
State Government Article, §§10-611 through 10-628,
Annotated Code of Maryland

.01 Scope.

This chapter sets out procedures under the Public Information Act for filing and processing requests to the Department of _____ for the inspection and copying of public records of the Department.

.02 Policy.

It is the policy of the Department to facilitate access to the public records of the Department, when access is allowed by law, by minimizing costs and time delays to applicants.

.03 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Act" means the Public Information Act, State Government Article, §§10-611 through 10-628, Annotated Code of Maryland.

(2) "Applicant" has the meaning stated in §10-611(b) of the Act.

(3) "Custodian" has the meaning stated in §10-611(c) of the Act.

(4) "Department" means the Department of _____.

(5) "Official custodian" has the meaning stated in §10-611(d) of the Act.

(6) "Public record" has the meaning stated in §10-611(g) of the Act.

(7) "Secretary" means the Secretary of _____.

(8) "Working day" means a day other than Saturday, Sunday, or a State holiday.

.04 Secretary as Official Custodian.

Unless otherwise provided by law, the Secretary is the official custodian of the public records of the Department.

.05 Who May Request Public Records.

Any person may request to inspect or copy public records of the Department.

.06 Necessity for Written Request.

A. Inspection.

(1) Except as otherwise provided in this chapter, the custodian shall make public records of the Department available for inspection by an applicant without demanding a written request.

(2) The custodian shall require a written request if the custodian reasonably believes that:

(a) The Act or any other law may prevent the disclosure of the public record to the applicant; or

(b) A written request will materially assist the Department in responding.

B. Copies.

If the applicant requests one or more copies of any public record of the Department, the custodian may require a written request.

.07 Contents of Written Request.

A written request shall:

A. A. Contain the applicant's name and address;

B. Be signed by the applicant; and

C. Reasonably identify, by brief description, the public record sought.

.08 Addressee.

A request to inspect or copy a public record of the Department shall be addressed to the custodian of the record. If the custodian is unknown, the request may be addressed to the Secretary.

.09 Response to Request.

A. If the custodian decides to grant a request for inspection, the custodian shall produce the public record for inspection:

(1) Immediately; or

(2) Within a reasonable time period, not to exceed 30 days after the date of the request, if that period is needed to retrieve the public record and conduct any necessary review.

B. (1) If the custodian decides to deny a request for inspection:

(a) The custodian shall do so within 30 days after the request; and

(b) Immediately notify the applicant of the denial.

(2) If a request is denied, the custodian shall provide the applicant, at the time of the denial or within 10 working days, a written statement that gives:

(a) The reasons for the denial;

(b) The legal authority for the denial; and

(c) Notice of the remedies available for review of the denial.

C. If a requested public record is not in the custody or control of the person to whom application is made, that person shall, within 10 working days after receipt of the request, notify the applicant:

(1) That the person does not have custody or control of the requested public record; and

(2) If the person knows:

(a) The name of the custodian of the public record; and

(b) The location or possible location of the public record.

D. With the consent of the applicant, any time limit imposed by §§A through C of this regulation may be extended for an additional period of up to 30 days.

.10 Notice to and Consideration of Views of Person Potentially Affected by Disclosure.

A. Unless prohibited by law, the custodian may provide notice of a request for inspection or copying of any public record of the Department to any person who, in the judgment of the custodian, could be adversely affected by disclosure of that public record.

B. The custodian may consider the views of the potentially affected person before deciding whether to disclose the public record to an applicant.

.11 Public Record Temporarily Unavailable.

If a requested public record of the Department is in the custody and control of the person to whom application is made but is not immediately available for inspection or copying, the custodian shall promptly:

A. Notify the applicant that the public record is not immediately available; and

B. Schedule a date within a reasonable time for inspection or copying.

.12 Public Record Destroyed or Lost.

If the person to whom application is made knows that a requested public record of the Department has been destroyed or lost, that person shall promptly:

A. Notify the applicant that the public record is not available; and

B. Explain the reasons why the public record cannot be produced.

.13 Review of Denial.

A. If the custodian denies a request to inspect or copy a public record of the Department, the applicant may, within 30 days after receipt of the notice of denial, request an administrative hearing.

B. If the applicant requests a hearing:

(1) The hearing shall be governed by Title 10, Subtitle 2 of the State Government Article; and

(2) The Secretary shall issue the final decision of the Department unless the Secretary delegates final decision authority.

C. If the hearing results in a total or partial denial of the request, the applicant may file an appropriate action in the circuit court under §10-623 of the Act.

D. If the applicant does not request a hearing, the applicant may file an action for judicial enforcement under §10-623 of the Act without exhausting that administrative remedy.

.14 Disclosure Against Public Interest.

A. Denial Pending Court Order.

(1) If, in the opinion of the Secretary, disclosure of a public record of the Department otherwise subject to disclosure under the Act would do substantial injury to the public interest, the Secretary may temporarily deny the request to obtain a court order allowing nondisclosure.

(2) The temporary denial shall be in writing.

B. Circuit Court Review.

(1) Within 10 working days after the denial, the Secretary shall apply to the appropriate circuit court for an order permitting continued denial or restriction of access.

(2) Notice of the Secretary's complaint shall be served on the applicant in the manner provided for service of process by the Maryland Rules of Procedure.

.15 Fees.

A. The fee schedule for copying and certifying copies of public records of the Department is as follows:

(1) Copies.

(a) The fee for each copy made by a photocopying machine within the Department is 25 cents per page.

(b) The fee for each copy made otherwise shall be based on the actual cost of reproduction.

(2) Certification of Copies. If a person requests that a copy of a public record be certified as a true copy, an additional fee of $1 per page (or if appropriate, per item) shall be charged.

(3) Minimum Fee. No charge will be made if the total fee is $1 or less.

B. Notwithstanding §A of this regulation, if the fee for copies or certified copies of any public record of the Department is specifically set by a law other than the Act or this regulation, the custodian shall charge the prescribed fee.

C. If the custodian cannot copy a public record within the Department, the custodian shall make arrangements for the prompt reproduction of the record at public or private facilities outside the Department. The custodian shall:

(1) Collect from the applicant a fee to cover the actual cost of reproduction; or

(2) Direct the applicant to pay the cost of reproduction directly to the facility making the copy.

D. A. Before copying a public record of the Department, the custodian shall estimate the cost of reproduction and either:

(1) Obtain the agreement of the applicant to pay the cost; or

(2) Demand prepayment of the cost.

E. Except as provided in §F of this regulation, the custodian may charge a reasonable fee for time that an official or employee of the Department spends:

(1) To search for requested public records; or

(2) To prepare public records for inspection and copying.

F. The custodian may not charge a search or preparation fee for the first 2 hours that an official or employee of the Department spends to respond to a request for public records.

G. Waiver or Reduction of Fee.

(1) The official custodian may waive or reduce any fee set under this regulation if:

(a) The applicant requests a waiver; and

(b) The custodian determines that the waiver or reduction is in the public interest.

(2) The official custodian shall consider, among other relevant factors, the ability of the applicant to pay the fee.

H. If the applicant requests that copies of a public record be mailed or delivered to the applicant or to a third party, the custodian may charge the applicant for the cost of postage or delivery.

.16 Time and Place of Inspection.

A. An applicant may inspect any public record of the Department that the applicant is entitled to inspect during the normal working hours of the Department.

B. The inspection shall occur where the public record is located, unless the custodian, after taking into account the applicant's expressed wish, determines that another place is more suitable and convenient.

Chapter 02 Correction or Amendment of Public Records

Authority: [Department's authority to adopt regulations];
State Government Article §10-625,
Annotated Code of Maryland

.01 Scope.

This chapter sets out procedures under which a person in interest may request the correction or amendment of public records of the Department of _____ .

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Custodian" has the meaning stated in State Government Article, §10-611(c), Annotated Code of Maryland.

(2) "Department" means the Department of _____.

(3) "Person in interest" has the meaning stated in State Government Article, §10-611(e), Annotated Code of Maryland.

(4) "Public record" has the meaning stated in State Government Article, §10-611(g), Annotated Code of Maryland.

(5) "Secretary" means the Secretary of _____.

.03 Who May Request.

A person in interest may request that the Department correct or amend any public record that:

A. The Department keeps; and

B. The person in interest is authorized to inspect.

.04 Contents of Request.

A. A person in interest shall make a request to correct or amend a public record in writing [on a form provided by the Department].

B. The request shall:

(1) Identify the public record to be corrected or amended;

(2) State the precise correction or amendment requested;

(3) State the reason for the correction or amendment; and

(4) Include a statement that, to the best of the requester's belief, the public record is inaccurate or incomplete.

.05 Addressee.

A request to correct or amend a public record shall be addressed to the custodian of the record. If the custodian is unknown, the request may be addressed to the Secretary.

.06 Return of Nonconforming Request.

A. The Department shall accept a request to correct or amend a public record when it is received if it reasonably complies with Regulations .04 and .05 of this chapter.

B. If the request does not reasonably comply with Regulations .04 and .05 of this chapter, the Department shall return the request to the requester with:

(1) An explanation of the reason for the return; and

(2) A statement that, on receipt of a request that reasonably complies with Regulations .04 and .05 of this chapter, the request will be accepted.

.07 Response to Request.

Within 30 days after the Department receives a request for correction or amendment that reasonably complies with Regulations .04 and .05 of this chapter, the custodian shall:

A. Make the requested correction or amendment, and inform the requester in writing of the action; or

B. Inform the requester in writing that the Department will not:

(1) Make the requested correction or amendment, and the reason for the refusal; or

(2) Act on the request because:

(a) The requester is not a "person in interest";

(b) The requestor is not authorized to inspect the record; or

(c) Of any other reason authorized by law.

.08 Refusal of Request.

If the Department refuses to make a requested correction or amendment, a person in interest may file with the Department a concise statement of the reasons for:

A. The requested correction or amendment; and

B. The person's disagreement with the refusal of the Department to make the correction or amendment.

.09 Requirements for Statement of Disagreement.

The statement submitted under Regulation .08 shall:

A. Be on pages no larger than 8½ x 11 inches in size;

B. Use only one side of each page; and

C. Consist of no more than 5 pages.

.10 Providing Statement of Disagreement.

If a person in interest files a statement of disagreement concerning a public record under Regulations .08 and .09 of this chapter, the Department shall provide a copy of the statement whenever the Department discloses the public record to a third party.

.11 Administrative Review.

A. A person may request administrative review under this regulation if the Department:

(1) Has refused the person's request to correct or amend a public record under Regulation .07 of this chapter;.

(2) Has rejected the person's statement of disagreement under Regulation .08 of this chapter; or

(3) Has not provided a statement of disagreement to a third party under Regulation .10 of this chapter.

B. A request for review shall be filed with the Secretary within 30 days after the requester is advised of the Department's action.

C. The review proceedings shall be conducted in accordance with State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland, and the administrative hearing regulations of the Department.

LIST OF

ATTORNEY GENERAL OPINIONS

Appendix E

OPINIONS OF THE ATTORNEY GENERAL

on the

MARYLAND PUBLIC INFORMATION ACT

A. Scope of the Public Information Act; Disclosable Records

83 *Opinions of the Attorney General* __ [Opinion No. 98-025 (December 18, 1998)]

The gross amount of bonuses or performance awards paid to county appointed officials or merit system employees is available to the public under the PIA.

82 *Opinions of the Attorney General* ___ [Opinion No. 97-007 (March 14, 1997)]

An individual is generally entitled under the PIA to Motor Vehicle Administration records related to a review of the individual's fitness to drive, including records of the MVA's Medical Advisory Board. However, under SG § 10-618(f)(2), the MVA may treat as a confidential source someone who writes to the MVA concerning an individual's fitness to drive if the informant would reasonably expect confidentiality.

81 *Opinions of the Attorney General* ___ [Opinion No. 96-016 (May 22, 1996)].

"Public record" includes printed version of e-mail as the paper will itself be a "public record," but even if message was never printed, the version of the e-mail retained in the computer's storage would also be a "public record."

80 *Opinions of the Attorney General* ___ [Opinion NO. 95-057 (December 20, 1995)].

The definition of "public record" does not extend to records that are required to be maintained by an applicant for a residential child care facility license but that never come into possession of the State agency.

79 *Opinions of the Attorney General* ___ (1994) [Opinion No. 94-044 (August 23, 1994)]

Although personnel records and other information regarding applicants for employees in Baltimore City Public Schools would otherwise be protected from inspection by the PIA, disclosure was authorized by virtue of a federal district court order.

79 *Opinions of the Attorney General* ___ [Opinion No. 94-029 (May 13, 1994)].

The criteria for determining eligibility for representation by the Public Defender is open for public inspection unless otherwise provided by law.

76 *Opinions of the Attorney General* 287 (1991)

Requests from the Legislative Auditor in connection with an audit are not governed by the PIA.

73 *Opinions of the Attorney General* 12 (1988)

Letters to the Agriculture Department complaining about gypsy moth spraying are generally disclosable.

71 *Opinions of the Attorney General* 282 (1986)

County ethics ordinance requires disclosure of certain information ordinarily within exceptions to disclosure.

71 *Opinions of the Attorney General* 288 (1986)

Tape recordings of calls to 911 Emergency Telephone System Centers are public records but portions of the recordings may fall within certain exceptions to disclosure.

71 *Opinions of the Attorney General* 318 (1986)

Federal and State statutes regarding the confidentiality of tax-related information prohibit disclosure of information concerning the personal and business affairs of identifiable taxpayers. However, (1) non-confidential information about the taxpayer's plans to engage in certain regulated business activities or the taxpayer's authority to collect the retail sales tax and (ii) information that cannot be associated with any particular taxpayer must be disclosed to the public upon request.

68 *Opinions of the Attorney General* 330 (1983)

Individual criminal trial transcripts in the hands of the Public Defender are public records.

Opinion No. 91-034 (unpublished) (1981)

Under the Education Article of the Maryland Code and the Public Information Act, a County Council is entitled, as part of its review of the county school board's annual budget request, to receive supporting budgetary details that include the actual salaries paid to school board employees.

Opinion No. 79-024 (unpublished) (1979)

A managerial audit letter prepared for the Board of Education is a public document and, as such, the County Commissioners and the Director of Finance are entitled by law to a copy of the letter.

Opinion No. 79-032 (unpublished) (1979)

The Retail Sales Tax Division of the Comptroller of the Treasury must provide the State Department of Personnel with a list of the names of accounts that have been audited by the Division.

Opinion No. 78-085 (unpublished) (1978)

Neither the Insurance Commissioner nor Maryland Automobile Insurance Fund may deny the Legislative Auditor access to the report of examination of MAIF's Uninsured Division and the related work papers.

63 *Opinions of the Attorney General* 502 (1978)

Juvenile records may be released to the Division of Parole and Probation by the various custodians of juvenile records without a court order, but the better practice would be to get a court order. The Division of Parole and Probation may deny disclosure of a particular record if it was compiled for a law enforcement or prosecution purpose.

63 *Opinions of the Attorney General* 543 (1978)

Arrest logs are public records and the only grounds for denying public access to them would be pursuant to Article 76A, §3(f).

62 *Opinions of the Attorney General* 396 (1977)

Any member of the public is entitled to inspect and copy registration records of the Board of Election Supervisors unless there is a "special order of the Board" or a "reasonable regulation" by the Board to the contrary.

62 *Opinions of the Attorney General* 579 (1977)

Information relating to legal fees paid by Maryland Automobile Insurance Fund to individual defense counsel engaged to represent the agency or its insured must be divulged upon demand.

62 *Opinions of the Attorney General* 712 (1977)

The Public Information Act requires the property tax assessment appeal boards to permit any person to inspect any of its records with certain exceptions (Article 81, §45(d)).

Opinion No. 77-013 (unpublished) (1977)

The PIA requires the Department of Licensing and Regulation to honor requests for copies of numerical listings of all licensees, assembled as part of an annual routine of issuing renewal licenses.

Opinion No. 76-30 (unpublished) (1976)

Salary information with respect to employees at Prince George's Community College generally is subject to disclosure under the Public Information Act.

Opinion No. 76-142 (unpublished) (1976)

The author's name on a letter to the Maryland State Board of Ethics is considered a "public record" and does not fall within any of the exceptions to the requirement of disclosure.

61 *Opinions of the Attorney General* 702 (1976)

The Maryland Public Information Act does not in general authorize clerks of courts to deny public inspection of marriage records, no matter what the intended use.

60 *Opinions of the Attorney General* 498 (1975)

The nature of mileage forms, the purpose for which they are kept, and the place where they are kept make it clear that they are not personnel records, but are vehicle records only and, as such, they are public records open for inspection.

60 *Opinions of the Attorney General* 600 (1975)

Disclosure of students' names and addresses to third parties by school officials even without parents' consent is not prohibited by the PIA. However, disclosure may be prohibited by a federal statute, the Family Education Rights & Privacy Act of 1974, "the Buckley Amendment." 20 U.S.C. §1232(g).

59 *Opinions of the Attorney General* 59 (1974)

A list provided by the Bank Commissioner of a bank's bona fide shareholders or subscribers showing the name, residence, and actual number of shares subscribed to and paid for are not exempt from the general requirement of disclosure. However, personal financial statements may not be released.

59 *Opinions of the Attorney General* 586 (1974)

County boards of education are not prohibited by the PIA from releasing the names and addresses of students within their schools. However, disclosure may be prohibited by a federal statute, the Family Educational Rights and Privacy Act of 1974, "the Buckley Amendment," 20 U.S.C. §1232(g).

Opinion No. 74-239 (unpublished) (1974)

Disclosure of the names of all lawyers, doctors, and independent adjustors used by the Maryland Automobile Insurance Fund is compelled under the Public Information Act.

58 *Opinions of the Attorney General* 14 (1973)

The State Department of Assessments and Taxation is barred from permitting inspection of a taxpayer's assessment worksheet by anyone but the taxpayer to whom the property is assessed and officers of the State and subdivision affected.

58 *Opinions of the Attorney General* 53 (1973)

The Act applies to all members of the general public and does not make exception for any segment thereof.

57 *Opinions of the Attorney General* 500 (1972)

All materials considered in connection with appointment or promotion in the Police Department are open to inspection but this does not extend to the identity of the applicant's examiner or examiners.

57 *Opinions of the Attorney General* 518 (1972)

Criminal records that the court orders expunged need not be physically destroyed, but should be segregated and public and private access can be denied.

B. Role of the Custodian

68 *Opinions of the Attorney General* 330 (1983)

Public Defender is "official custodian" of trial transcript obtained by the Public Defender's office in the course of its legal representation of an indigent defendant.

65 *Opinions of the Attorney General* 365 (1980)

If a public official uses his or her public office to obtain the personnel file of another person, the public official becomes a de facto "custodian" of that file, subject to the statutory obligation imposed by the Public Information Act on a "custodian" to deny access to the file by unauthorized persons; as "custodian," the public official is subject to criminal penalties applicable to violations of the statute.

64 *Opinions of the Attorney General* 236 (1979)

Determination whether disclosure is contrary to the public interest is within the discretion of the custodian.

63 *Opinions of the Attorney General* 197 (1978)

If the Public Safety Data Center consolidates with the Baltimore Computer Utility, the Secretary of Public Safety and Correctional Services would continue to be the "official custodian" of the criminal history records stored in the shared system and the Maryland State Police would continue to be the "custodians" of such records.

C. Right of Access

81 *Opinions of the Attorney General* ___ (1996) [Opinion No. 96-003 (January 31, 1996)]

Waiver of fee is dependant upon a number of relevant factors and cannot be based solely on the poverty of the requester or the cost to the agency.

71 *Opinions of the Attorney General* 318 (1986)

In complying with any request for disclosable information, the Retail Sales Tax Division may impose a reasonable charge for the costs incurred, including the cost of all computer time actually used.

63 *Opinions of the Attorney General* 453 (1979)

The Legislative Auditor has broad statutory authority to examine records of State agencies, including medical records of the Department of Health & Mental Hygiene, in assessing the performance of the Department.

60 *Opinions of the Attorney General* 563 (1973)

Personnel files may be available to investigators representing the Division of Fiscal Research for purposes connected with the performance of the Division's statutory duties.

58 *Opinions of the Attorney General* 563 (1973)

The Public Information Act speaks only of the "right of inspection" of public records or "access to" such records. It does not compel a custodian to take affirmative action to disclose information absent a request.

56 *Opinions of the Attorney General* 461 (1971)

The Public Information Act does not guarantee the right to the requested information to any specific form. The State Department of Assessments and Taxation is not required to give information in the form of a duplicate data processing tape but may give a printout instead.

D. Exceptions to Disclosure

1. Exceptions Based on Other Sources of Law

82 *Opinions of the Attorney General* __ [Opinion No. 97-028 (December 16, 1997)]

While a document is not confidential as a matter of law merely because it is prepared by a county attorney, the attorney-client privilege or other appropriate privileges are available to protect the confidentiality of a document and prevent disclosure under the PIA to the extent the document is encompassed by those privileges.

81 *Opinions of the Attorney General* ___ (1996) [Opinion No. 96-019 (May 23, 1996)]

Agency recipient of a management letter that is partly privileged may decline to disclose those parts of the letter to another government agency, unless other law requires disclosure.

66 *Opinions of the Attorney General* 98 (1981)

Notwithstanding the General Assembly's broad authority to inquire into the State's fiscal affairs, budget recommendations requested by and submitted to the Governor in confidence by various executive agencies are subject to Executive Privilege and, as such, are privileged from disclosure to the General Assembly.

64 *Opinions of the Attorney General* 236 (1979)

The common law doctrine of grand jury secrecy makes records obtained by a State's Attorney's office solely for use in a grand jury investigation non-disclosable under §3(a)(iv) or the Public Information Act.

63 *Opinions of the Attorney General* 659 (1978)

The Maryland Public Information Act may not be used to disclose birth and death certificates, or the identifying information contained thereon, since it is confidential by law, but autopsy reports may be obtained from the custodian of such reports under this statute.

61 *Opinions of the Attorney General* 340 (1976)

The State Public Information Act generally denies access to educational records "unless otherwise provided by law." It is permissible for a representative of the State Department of Education to examine the academic records of certain students at Morgan State University.

Opinion No. 75-060 (unpublished) (1975)

Release of information that a specific individual is currently a patient in a State mental hospital is contrary to former Article 59, §19 and, as such, would be an exception to the Public Information Act's grant of access to public records.

2. Discretionary Exceptions

77 *Opinions of the Attorney General* 183 (1992)

Custodian of investigatory records has discretion whether to disclose name and address of victim of crime.

64 *Opinions of the Attorney General* 236 (1979)

The Police Department must disclose investigative reports, or a severable part of them, unless disclosure would be contrary to the public interest.

Opinion No. 75-202 (unpublished) (1975)

The report of the Maryland Automobile Insurance Fund Advisory Board subcommittee may be withheld from public inspection in the discretion of the executive director and the Board of Trustees of MAIF.

58 *Opinions of the Attorney General* 53 (1973)

Access may be denied to the report prepared for the Maryland Transportation Authority by an independent engineering consulting firm to assist the Authority in preparing its defense to claims filed against it. Disclosure of the claims, resulting in a potentially significant cost to the public, is clearly contrary to public interest.

58 *Opinions of the Attorney General* 563 (1973)

The custodian of Police Department records may deny public access to arrest records only upon a determination that disclosure would be contrary to the public interest.

3. Mandatory Exceptions

79 *Opinions of the Attorney General* ___ (1994) [Opinion No. 94-026 (May 9, 1994)]

Responses of lawyers on questionnaires, about judicial performance, which provide the raw data for the performance evaluations; the compiled data for each judge, and the evaluation reports themselves are exempt from disclosure.

78 *Opinions of the Attorney General* 291 (1993)

Employee-related information stemming from a complaint about discriminatory behavior is a personnel record that may not be disclosed to third parties.

77 Opinions of the Attorney General 188 (1992)

Value or description of abandoned property constitutes personal financial information that may not be disclosed.

71 *Opinions of the Attorney General* 297 (1986)

A tape recording of an involuntary admission hearing may be disclosed only to a patient or authorized representative.

71 *Opinions of the Attorney General* 368 (1986)

Under certain conditions, information about the handling of a child abuse case by the local Department of Social Services may be disclosed.

69 *Opinions of the Attorney General* 231 (1984)

Architectural and engineering plans that are submitted to a county as a prerequisite to issuance of a building permit are public records and must be disclosed unless they contain commercial information that would give competitors of the submitter a concrete advantage in obtaining future work on that or a similar project.

68 Opinions of the Attorney General 335 (1983)

A custodian must deny inspection of letters of reference) solicited or unsolicited) that concern a person's fitness for public office or employment.

Opinion No. 83-044 (unpublished) (1983)

While performing evaluations of local directors of social services, local boards have the right to examine internal Department of Human Resources documents that relate to performance but may not use or disseminate the information in contravention of any confidentiality requirements imposed by Article 88A, 36 or State Government Article §10-616(h).

63 *Opinions of the Attorney General* 432 (1978)

Nonprofit health service plans may not release personal medical record information, without the consent of the individuals, to employers who sponsor and maintain group health plans. The only exception would be if the information was released without identifying the subscribers.

Opinion No. 77-006 (unpublished) (1977)

Public Information Act does not prohibit the disclosure of a State, county, or municipal job or position description.

Opinion No. 75-071 (unpublished) (1975)

The information contained in the application for State Certification of Conformance for Hospitals and Related Institutions and/or Federal §1122 Certification for Reimbursement of Capital Expenditures should be open to the public unless it is confidential.

Opinion No. 73-099 (unpublished) (1973)

The Comptroller may release information relating to taxpayers to the Treasury Department of the United States.

63 *Opinions of the Attorney General* 355 (1975)

The custodian shall determine if data is a "trade secret" or "confidential commercial or financial data." The mere assertion by a vendor that commercial data is confidential is not sufficient. One important indicium of confidentiality or privilege is whether the records are customarily so regarded in the trade or industry.

60 *Opinions of the Attorney General* 559 (1975)

Where an employee of the Department of Health and Mental Hygiene has filed a claim for Workmen's Compensation with the State Accident Fund, its investigators should be provided access to information concerning the claimant, or otherwise pertinent to the claim, contained in the Department's personnel file.

60 *Opinions of the Attorney General* 600 (1975)

Degree information, including credits earned by teachers in specific school systems, should not be disclosed.

4. Preventing Disclosure Where No Exception Applies

Opinion No. 76-142 (unpublished) (1976)

If disclosure would do substantial injury to public interest, a custodian may seek a court order to permit denial or restriction of access.

E. Procedures for Making a Request for Inspection or Copying

81 *Opinions of the Attorney General* ___ (1996) [Opinion No. 96-003 (January 31, 1996)]

Waiver of fee is dependant upon a number of relevant factors and cannot be based solely on the poverty of the requester or the cost to the agency.

61 *Opinions of the Attorney General* 698 (1976)

There is no requirement that an applicant give a reason for the request.

F. Liability of Persons Who Violate the Act

65 *Opinions of the Attorney General* 365 (1980)

If a public official uses his or her public office to obtain the personnel file of another person, the public official becomes a de facto "custodian" of that file, subject to the statutory obligation imposed by the Public Information Act on a "custodian" to deny access to the file by unauthorized persons; as "custodian," the public official is subject to criminal penalties applicable to violations of the statute.

61 *Opinions of the Attorney General* 698 (1976)

A person who violates the Public Information Act may be subject to criminal and/or civil action.

G. Correction of Records

76 *Opinions of the Attorney General* 276 (1991)

PIA procedures for correction of records do not apply to a death certificate. (Reversed by subsequent legislation. *See* Chapter 547, Laws of Maryland 1992.)

Appendix F Consists of

RESPONDING TO REQUESTS UNDER THE MARYLAND PUBLIC INFORMATION ACT: A SUGGESTED PROCESS

Which may be downloaded separately from the "Open Government" page of the Attorney General's website.

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